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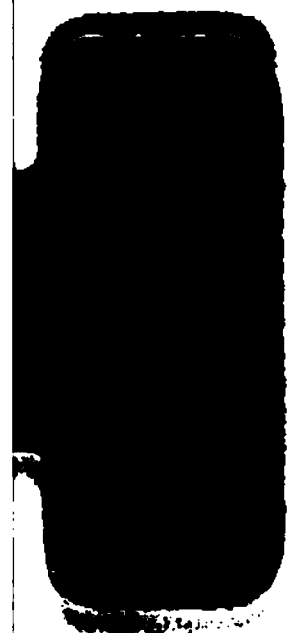
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April 1900

A NEW
ABRIDGMENT OF THE LAW.

BY MATTHEW BACON,
OF THE MIDDLE TEMPLE, ESQ.

WITH
LARGE ADDITIONS AND CORRECTIONS,

BY SIR HENRY GWYLLIM,
AND
CHARLES EDWARD DODD, ESQ.

AND WITH
THE NOTES AND REFERENCES MADE TO THE EDITION PUBLISHED
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BY JOHN BOUVIER.

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SIMONY.

SIMONY, so called from Simon Magus, is the buying or selling of holy orders, or an ecclesiastical benefice.

The words ecclesiastical benefice comprehend every ecclesiastical dignity and promotion.

As by the purchase of ecclesiastical benefices worthy and learned men may be kept out of the church, and a door may, to the great scandal of religion and prejudice of morality, be opened to persons by no means qualified to discharge the duties of the sacred function, it is of the utmost consequence to society that it be prevented. With a view to this, canons were anciently made, by which a very strict oath was enjoined; and the purchaser of an ecclesiastical benefice was punished with deprivation or disability, as the case might require.

It has been said that simony was no offence at the common law; (a) and the case of Gregory v. Oldbury, Moor, 564, has been as to this point relied upon. It is laid down in that case, that a bond to pay money upon a simoniacal contract is good, because simony is no offence at the common law. But, by attending to what is laid down in other books, it will appear, that although simony *eo nomine* be not an offence, either at the common law or against the statute, for the word simony is not therein contained, a corrupt bargain for presenting to a benefice is an offence at the common law.

[(a) Simony, as such, was unknown to the common law; though I agree that corrupt presentation was. Burnett's Past. Care, 22. But what is or is not simony now depends on the statute of 31 Eliz. c. 6, which did not adopt all the wild notions of the canon law; but has defined it to be a *corrupt* agreement to present. In Co. Entr, 516, it is expressed *simoniace et corrupte*; but the latter is the legal and effective word. Per De Grey, C. J., 2 Bl. Rep. 1054.]

In 1 Inst. 17 b, such corrupt bargain is said to be so detestable in the eye of the common law, that a plaintiff in *quære impedit* could not, before the statute of Westm. 2, recover damages for the loss of his presentation, it being considered as a thing of no value. In 1 Inst. 89, it is said, that a guardian in socage could not present to an advowson in right of his heir; because, as he could take nothing for the presentation, he could not bring it to account.

This doctrine is confirmed in 3 Inst. 156, and it is added, that simony is the more odious to the common law, because it is ever accompanied with perjury; the presentee being sworn to commit no simony.

In Macaller v. Todderick, Cro. Car. 353, it is said that simony has, by the law of God and of the land, been always accounted a great offence.

In Winchcomb v. Pulleston, Hob. 167, it is laid down, that a bond upon a simoniacal contract is against law, because it is given upon a contract *ex turpi causa*, and *contrà bonos mores*; nay, that it is as void as an usurious bond, which, if an executor pay, he is guilty of a *devastavit*.

In Carth. 252, Bartlett v. Vinor, such bond is said to be void, as being against law, although it be not so declared by the statute.

(A) In what Simony consists.

Other authorities might be added ; but these are sufficient to show that a corrupt bargain for presenting to a benefice is an offence at the common law.

As neither the consideration of the greatness of the offence of simony, nor the provision made against it by the canon or common law, was sufficient to put a stop to this offence, it was at length prohibited, under very severe penalties, by the 31 Eliz. c. 6.

Under this head it will be proper to consider,

- (A) In what the Offence of Simony does consist.
- (B) How far a Bond for resigning a Benefice is good at Law.
- (C) Of the Power exercised over a Bond for resigning a Benefice by Courts of Equity.
- (D) Whether the Penalty of a Bond for resigning a Benefice be saved, where the Ordinary has refused to accept a Resignation.
- (E) Some Objections to a Bond for resigning a Benefice considered.
- (F) Of the Forfeitures, Disabilities, and Punishments incurred by Simony.
 - 1. *By the Incumbent.*
 - 2. *By the Patron.*
 - 3. *By the Ordinary.*
- (G) In what Cases, and at what Times, Advantage may be taken of the Forfeitures and Disabilities incurred by Simony.
 - 1. *By the King.*
 - 2. *By other Persons.*
- (H) Of the Jurisdiction of Spiritual Courts in Simony.
- (I) Of the Pleadings in an Action upon the 31 Eliz. c. 6.

(A) In what the Offence of Simony does consist.

It has already been observed, that simony is an offence at the common law : but, as much the greater part of the determinations, as to what is simony, are founded upon 31 Eliz. c. 6, and some paragraphs of that statute not only contain a description of the offence, but likewise ordain what forfeitures and penalties shall be incurred, and who may take advantage thereof, it will be proper to recite the whole paragraphs in this place, and afterwards to refer to them ; and as frequent mention will, in treating of this subject, be made of the oath against simony, that oath shall be likewise recited.

By § 5 it is enacted, “ That if any person or persons, bodies politic and corporate, shall, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration, that then every such presentation, collation, gift, and bestowing, and every admission, institution, investure, and induction thereupon shall be utterly void, frustrate, and of no effect in law ; and that it shall and may be lawful for the queen, her heirs and successors, to present, collate unto, or give or bestow every such benefice, dignity, prebend, and

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living ecclesiastical, for that time or turn only; and that every person or persons, bodies politic and corporate, that shall give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant, or other assurance, shall forfeit and lose *the double value of one year's* profit of every such benefice, dignity, prebend, and living ecclesiastical; and the person so corruptly taking, procuring, seeking, or accepting any such benefice, dignity, prebend, or living, shall, thereupon and from thenceforth, be adjudged a disabled person in law to have or enjoy the same benefice, dignity, prebend, or living ecclesiastical."

Every person presenting for corrupt consideration to forfeit the next turn, and every person giving or taking any thing for a presentation to forfeit the double value, and the presentee to be incapable of enjoying the benefice.

By § 6 it is enacted, "That if any person shall, for any sum of money, reward, gift, profit, or commodity, other than for usual and lawful fees, or for or by reason of any promise, agreement, grant, covenant, bond, or other assurance, of or for any sum of money, reward, gift, profit, or benefit, directly or indirectly, admit, institute, install, induct, invest, or place any person in or to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, that every person so offending shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical; and that, immediately from and after the investing, installation, or induction thereof had, the same benefice, dignity, prebend, and living ecclesiastical shall be *eftsoons* merely void; and the patron or person to whom the advowson, gift, presentation, or collation shall by law appertain, shall and may, by virtue of this act, present or collate unto, give and dispose of, the same benefice, dignity, prebend, or living ecclesiastical, in such sort, to all intents and purposes, as if the party so admitted, instituted, installed, invested, inducted, or placed, had been or were naturally dead."

Every person corruptly instituting to a benefice to forfeit the double value; and the benefice to be void.

By § 7 it is provided, "That no title to confer or present by lapse shall accrue to any voidance mentioned in this act, but after six months next after notice given of such voidance by the ordinary to the patron."

No lapse to be till after six months' notice to the patron that the benefice is void.

By § 8 it is enacted, "That if any incumbent of any benefice with cure of souls shall corruptly resign or exchange the same, or shall corruptly take for or in respect of resigning or exchanging the same, directly or indirectly, any pension, sum of money, or benefit, that then as well the giver as the taker of any such pension, sum of money, or other benefit corruptly, shall lose double the value of the sum so given, taken or had; the one moiety, as well thereof, as of the forfeiture of double value of one year's profit before mentioned, to be to the queen's majesty, her heirs and successors, and the other moiety to him or them that will sue for the same, by action of debt, bill, or information, in any of her majesty's courts of record."

The giver or taker of money for resigning or exchanging a benefice to lose double the sum.

By § 9 it is provided, "That nothing in this act shall in any wise extend to take away, or restrain, any punishment, pain, or penalty, limited, pre-

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scribed, or instituted by the laws ecclesiastical, for any the offences before in this act mentioned, but that the same shall remain in force and may be put in execution, as it might be before the making of this act."

The penalties of the ecclesiastical laws not taken away by this act.

By § 10 it is enacted, "That if any person or persons shall at any time receive or take any money, fee, reward, or any other profit, directly or indirectly, or shall take any promise, agreement, covenant, bond, or other assurance, to receive or have any money, fee, reward, or any other profit, directly or indirectly, either to him or themselves, or to any other of their or any of their friends, ordinary and lawful fees only excepted, for or to procure the ordaining or making of any minister or ministers, or giving of any orders, or license or licenses to preach, that every person and persons so offending, shall, for every such offence, forfeit and lose the sum of forty pounds of lawful money of England, and the party so corruptly ordained or made minister, or taking orders, shall forfeit and lose the sum of ten pounds; and if at any time, within seven years next after such corrupt entering into the ministry, or receiving of orders, he shall accept or take any benefice, living, or promotion ecclesiastical, that immediately from and after the induction, investing, or installation thereof, or thereinto had, the same benefice, living, and promotion ecclesiastical, shall be estsoons merely void; and the patron or person to whom the advowson, gift, presentation, or collation shall by law appertain, may by virtue of this act present or collate unto, give or dispose of, the same benefice, living, or promotion ecclesiastical, in such sort, to all intents and purposes, as if the party so inducted, invested, or installed, had been, or were naturally dead: any law, ordinance, qualification, or dispensation to the contrary notwithstanding; the one moiety of which forfeitures shall be to her majesty, her heirs and successors, and the other moiety to him or them that will sue for the same, by action of debt, bill, plaint, or information in any of her majesty's courts of record."

The taker of money to procure or give orders to forfeit forty pounds, and the party so ordained to forfeit ten pounds; and any benefice he is presented to within seven years after to be void.

I, A B, do swear, that I have made no simoniacal contract, payment, or promise, directly or indirectly, by myself, or by any other, to my knowledge or with my consent, to any person or persons whatsoever, for or concerning the procuring and obtaining of this ecclesiastical dignity, place, preferment, office, or living; (*here that to which the party is to be admitted, instituted, collated, installed, or confirmed, is to be particularly named*;) nor will at any time hereafter perform, or satisfy, any such payment, contract, or promise made by any other without my knowledge or consent; so help me God, through Jesus Christ.

The oath against simony.

A donative is not within the words of the statute, yet, as a corrupt presentation thereto is within the mischief intended to be remedied, it is within the meaning.

Cro. Car. 331; Bawderok v. Mackaller.

The offences prohibited by the statute are more frequently committed when a church is void; but they may be committed when it is full.

If a contract be made when a church is full, to give a sum of money

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after it shall become void for the presentation thereto, this is an offence within the meaning of the statute.

1 Brownl. 7.

The buying of the next presentation to a church when it is full, with intent to present a certain person when it shall become void, and the presenting of that person, is an offence within the meaning of the statute.

Lane, 102; Kitchen v. Calvert, Noy, 25; Winchcomb v. Pulleston, Godb. 390.

The purchase of the next presentation to a church, when the incumbent is sick and near dying, with intent to present a certain person after his death, and the presenting of that person, is an offence within the meaning of the statute.

Winch, 63, Sheldon v. Brett.

It has been holden, that if a father, the incumbent being sick, purchase a living without the privity of his son, it is not a corrupt contract, although it be with design to present the son, and the son be afterwards presented, a father being bound by nature to provide for his son.

Cro. Eliz. 685; Smith v. Shelborn, Pasch. 4 Eliz.

But the doctrine in this case has been since contradicted, and particularly in the case of Winchcomb v. Pulleston, Noy 25, Pasch. 15, Jac. 1.

And the reason given in the former case, namely, that a father is bound by nature to provide for his son, does not hold: for if the purchase of a living, when full, with intent to present a certain person, be an offence within the meaning of the statute, how can it be lawful, as the words of the statute are general, for a father to do this? A parent is by nature certainly bound to provide for his son, but this obligation can never extend to the doing of a thing prohibited by law. This way of reasoning would open a wide door for corrupt contracts; for, as every man is more bound by the law of nature to provide for himself, than a father is to provide for his son, every man might purchase a living for himself.

In a case from the Court of Chancery, for the opinion of the Court of Common Pleas, it was stated, that Barrett, having notice that the incumbent of a rectory, with cure of souls, was upon his deathbed, and that it was uncertain whether he would live out the ensuing night, purchased the advowson of the rectory; that the incumbent died the day after the purchase; and that Barrett presented Reynell. The question was, Whether the presentation of Reynell be void, by reason of its having been upon a simoniacal contract? The unanimous opinion of the court was, that the presentation is not void: and by De Grey, C. J., *an advowson, which is a right of nominating to a benefice, being a temporal inheritance*, may be conveyed like any other temporal inheritance. It is certain that an advowson appendant may be lawfully purchased with the manor to which it is appendant, during a vacancy of the benefice; and there seems to be no reason why an advowson in gross should not. The 31 Eliz. c. 6, only relates to presentations, and consequently the sale of an advowson, even during a vacancy of the benefice, is not thereby prohibited, except the sale be connected with a corrupt contract for presenting. But if an advowson be granted during a vacancy of the benefice, the presentation upon that vacancy does not pass by the grant; it being a fruit fallen, or as is laid down in the case of Leak v. Babington, Cro. Eliz. 811, a chose in action. A *bonâ fide* purchase of an advowson is good, at what time soever it is made; and a corrupt purchase, whenever it is made, is bad. That which

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is said in the case of *The Bishop of Lincoln v. Woolforston*, 3 Burr. 1510, has been mentioned; namely, "that the court were clear, that a grant of a next presentation, or of an advowson, made after the church was actually fallen vacant, was a void grant." But this, so far as it relates to the grant of an advowson, seems to be a mistake of the reporter. As the purchase of the advowson *in the present case is not stated to have been connected with any corrupt contract for presenting Reynell, or with a design of presenting him*, neither of these things is to be presumed, and consequently the presentation of him is not void.

MS. Rep. *Barrett and Reynell, Clerk v. Glubbo, Clerk and Rolle*, Hil. 16 G. 3, in C. B.; [2 Bl. R. 1052, S. C.]

||It was lately decided by the Court of K. B., that a sale of the *next presentation* made in expectation of an immediate vacancy, the incumbent being on the point of death, was simoniacal, and the presentation made in pursuance of it void, though the clerk presented was not privy to the transaction, and though the contract was not made with a view to the presentation of any particular person; but this decision was afterwards reversed in the House of Lords.

Fox v. Bishop of Chester, 2 Barn. & C. 635; S. C. in Dom. Proc. 6 Bing. 1.||

Notwithstanding the determinations, that if a person purchased the next presentation to a benefice when full, with design to present a certain person, and did present that person after it became void, it was an offence within the meaning of the statute, it became a doubt whether it was so, for a clerk to purchase for himself the next presentation to a benefice while it was full, and to be presented thereto after it became void.

To put an end to this doubt, it is by the 12 Ann. c. 12, enacted, "That if any person shall for money, reward, gift, profit, or advantage, or for or by reason of any promise, agreement, grant, bond, or other assurance, of or for any money, reward, gift, profit, or benefit, directly or indirectly, in his own name, or in the name of any other person or persons, take, procure, or accept the next avoidance or presentation to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, and shall be presented or collated thereupon; that every such presentation or collation shall be utterly void and of no effect in law, and such agreement shall be deemed to be a simoniacal contract; and it shall be lawful for the queen's majesty, her heirs and successors, to present or collate unto such benefice, dignity, prebend, and living ecclesiastical, for that time or turn only; and the person so corruptly taking, procuring, or accepting such benefice, dignity, prebend, or living, shall from thenceforth be adjudged a disabled person to have and enjoy the same, and shall be subject to any punishment, pain, or penalty prescribed or inflicted by the laws ecclesiastical, in like manner as if such agreement had been made after such benefice, dignity, prebend, or living had become vacant."

It is equally an offence within the meaning of the statute, where there has been a corrupt presentation by a person usurping the right to present, as if it had been by the person having the right.

3 Inst. 153.

If a presentation be by one usurping the right of patronage, and pending an action of *quare impedit* for removing his clerk, who is afterwards removed, the benefice be sold, this is an offence within the meaning of the statute, for the church was never full of that clerk. If this were allowed,

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the statute might be eluded, for it would be only getting an usurper to present while the living was void, and then selling it.

3 Lev. 115, Walker v. Hammersly ; 2 Ventr. 32, S. C.

A corrupt contract with the wife of the patron is an offence within the meaning of the statute, although the patron himself be not privy thereto.

1 Roll, R. 235 ; Cro. Ja. 385.

If a clerk contract to give money for being presented to a church, and be afterwards presented thereto *gratis*, this is an offence within the meaning of the statute ; the clerk being deemed an unfit person to hold the benefice, for having at any time been capable of intending to obtain it corruptly.

Lane, 103, Kitchen v. Calvert.

A corrupt contract for procuring a presentation to a benefice between strangers, although neither the patron nor incumbent be privy thereto, is an offence within the meaning of the statute ; for if there be a corrupt contract, it matters not by whom it is made : but in this case the presentee is a *simoniacè promotus*, and not a *simoniacus*.

Cro. Car. 331, Bawderok v. Mackaller ; Sid. 329 ; 3 Lev. 337.

A second brother, having a right to present, made a corrupt contract to present a certain person ; but in order to elude the statute, surrendered the right of presenting to his elder brother. The latter, not being privy to the contract, presented the person who, pursuant thereunto, was to be presented. It was holden that the corrupt contract was an offence within the meaning of the statute, and that its being performed by an innocent person made no alteration in the case.

Lane, 73, Calvert v. Kitchen.

An agreement was between Richards, a friend of Boughton's and Taylor, that Boughton should present Hide, and that Taylor should pay Richards 20*l.* per annum for six years, in case Hide should so long live, for the use of Boughton. In an action of *quare impedit*, Hide pleaded, that he had no notice of the agreement at or before his presentation. Upon a demurrer it was holden, that the corrupt contract is enough, and that it is immaterial whether he had or had not notice thereof.

3 Lev. 338, Rex v. Hide and others.

If a stranger, the church being void, contract with the patron for a grant of the presentation, and present a person not privy to the contract, the presentee, although the grant, it being of a chose in action, be void, is not to be considered as an usurper, but as a *simoniacè promotus*, because he was presented in pursuance of a corrupt contract.

Cro. Eliz. 788, Baker v. Rogers.

If a father, the church being void, contract with the grantee of the next presentation to permit the grantor to present his son, and the son be presented, he is a *simoniacè promotus*.

Cro. Ja. 533, Booth v. Potter.

If a father, in consideration of a clerk's marrying his daughter, covenant with the father of the clerk to procure for him a presentation to a certain

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church when it shall become void, and the clerk be presented, when the church becomes void he is a *simoniacè promotus*.

Cro. Car. 425, Birt v. Manning.

If an agreement be to pay five pounds per annum to the widow of the last incumbent, or ten pounds per annum to the son of the last incumbent, so long as he shall be a student at Cambridge and unpreferred, neither of these is an offence within the meaning of the statute.

Noy, 142, Baker v. Mounford

A bond, with a condition that the incumbent shall not be absent eighty days in a year from his living, is not simoniacal; this being a lawful condition.

1 Roll. Rep. Carey v. Yeo.

A covenanted, that B his son should marry C, the daughter of D. In consideration of the marriage D covenanted to advance 300*l.* for his daughter's portion, and A covenanted to settle certain lands on B and C. There were likewise covenants on the part of A for the value of the lands and for quiet enjoyment, and a covenant on the part of D to procure a certain benefice for B on the next avoidance. It was holden, that this was not a corrupt contract, it not being a covenant in consideration of the marriage, but a distinct and independent covenant without any apparent consideration.

Cro. Ja. 426, Birt v. Manning.

|| Where a chapel in a township was endowed in 1428 with the vicarial tithes, and the inhabitants had the right of appointing a curate, and in an inclosure act, passed in 1797, it was recited as a matter of doubt, whether the curate was entitled to the small tithes, or to a *modus in lieu* thereof; and on a vacancy in 1801, the inhabitants appointed J P curate, on his signing an agreement with the inhabitants, stating that he was appointed to the curacy, and to the money-payment of 40*l.* 18*s.* 2*d.* annually, payable out of the lands in P, and that the inhabitants, considering the stipend insufficient, *voluntarily* agreed with J P to allow him in addition the sum of 29*l.* 11*s.* 10*d.*, provided, and it was thereby agreed, that the additional payment should not in any way alter the money-payment of 40*l.* 18*s.* 2*d.*, wherewith the lands, &c., had been *from time immemorial* charged in the right of the said church, and that the said J P did consent to accept the curacy on those terms: It was held by the Court of K. B. that the agreement was entered into for restraining the curate from asserting his rights, and was therefore an agreement for a benefit to the patron within the statute, and that the presentation was simoniacal and void; and the crown having presented for the simony, the court refused a *mandamus* to the bishop to license a subsequent curate appointed by the inhabitants.

The King v. Bishop of Oxford, 7 East, 600.

Where a bond was given by a father to his son, for securing to him an annuity until he should be in possession of a living of a given value, and the son signed an agreement, declaring that he would take holy orders, and accept such a living as soon as it could be procured for him, the Lord Chancellor expressed great doubts whether such a bond was not void: but the case was decided on other grounds, and *quære?*

Kircudbright v. Kircudbright, 8 Ves. 53.]

(B) Bonds for resigning Benefices. (*General Bonds.*)

A BOND for resigning a benefice is sometimes special, at other times it is general.

The condition of a special bond is, that the incumbent shall resign in favour of a certain person, when that person shall be capable of being presented to the benefice.

The condition of a general bond is, that the incumbent shall resign upon request.

A bond, with condition to resign within three months after request, was holden to be good, although the bond appeared to have been given with an intent that the patron should present his son; and by the court: A man may without any colour of simony bind himself for a good reason to resign, as if he take a second benefice, or if he be non-resident, or that the patron may present his son: but, if the condition of a bond be, to let the patron have a lease of the glebe or tithes, or to pay a sum of money, it is simoniacal. The judgment in this case was affirmed in the Exchequer Chamber.

Cro. Ja. 248, *Jones v. Lawrence*. [So, a bond given by the incumbent to the patron to resign if he did not reside upon the living, hath been holden good. *Bagshaw v. Bossley*, 4 Term R. 78. And where a bond was conditioned to reside, to resign for the patron's son to be presented, and to keep the parsonage-house and chancel in repair, the Court of King's Bench gave judgment for the plaintiff without argument, saying, as this was not precisely similar to the case of the Bishop of London v. Ffytche, they were bound by the established series of precedents. *Partridge v. Whiston*, *Ibid.* 359.]

The doctrine of this case, which was the case of a special bond, was not many years after extended to the case of a general bond, and the judgment in the latter case was also affirmed in the Exchequer Chamber.

Cro. Car. 180, *Babington v. Wood*; [Sir Wm. Jon. 220, S. C.; *Watson v. Baker*, Sir T. Raym. 175, S. P.]

In two modern cases, the court refused to permit the validity of a general bond for resigning a benefice to be argued against: and, in the former of these cases, it is said by the court, that a general bond for resigning a benefice has been frequently holden good in the Court of Chancery.

Stra. 227, *Peele v. The Countess of Carlisle*; Sayer, 141, *Wyndham v. Bowen*.

[And in the case of *Grey v. Hesketh*, Lord Hardwicke said, these sort of bonds are held good at law, and so they are in equity, unless an ill use is attempted to be made of them, in which case that court will interfere. However, notwithstanding these decisions, general bonds of resignation were declared void at law by the House of Lords in the great case (*a*) of the Bishop of London v. Disney Ffytche, (May, 1783;) and the judgment of the Court of Common Pleas, affirmed by the King's Bench, was accordingly reversed.

Ambl. 268. (*a*) This decision, which was brought about by the great eloquence and ability of the Chancellor Thurlow, and the honest zeal of the bishops, was contrary to the opinion of all the judges except Eyre, B., and seems not likely to be acquiesced in. Vide 4 Term. R. 78, 359.]

||In this case, L. D. Ffytche, Esq., brought a writ of *quare impedit*, in the Common Pleas, against the Bishop of London, for refusing to admit, institute, and induct the Rev. J. Eyre, the clerk presented by Mr. F. to the rectory of Woodham Walter, in Essex, whereof Mr. F. was patron. In Trinity term, 1781, after the commencement of the action of *quare impedit*, the bishop filed a bill of discovery in chancery, to discover whether a bond or security for resignation had been given by the clerk to the patron, in order to avail himself of the discovery for his defence at law. To this bill

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F. demurred, but the demurrer being overruled, the discovery was obtained, and the bishop then pleaded to the action in the Common Pleas, 1st, That in pursuance of a simoniacal contract between the said L. D. F. and John Eyre, the said L. D. F. presented the said John Eyre to the rectory, and the said John Eyre gave a bond to the said L. D. F., conditioned to resign the same upon request, by means whereof the presentation of the said John Eyre became void, and the said bishop did not nor could admit him under such presentation. 2d, That for the purpose of investing the said L. D. F. with undue influence and control over the said J. Eyre, as rector of the said rectory, it was agreed between them, that the said L. D. F. should present the said J. E. to the same, and that the latter should give such bond as aforesaid; that he was presented, and gave the bond; and that by means thereof the said L. D. F. would have acquired undue influence over the said J. Eyre, if he had been admitted, &c.; and he thereby became an unfit person, wherefore the bishop refused to admit him. F. demurred to these pleas; and in Hilary term, 1782, the Court of C. B. gave judgment against the bishop on both pleas. Upon this judgment the bishop brought a writ of error in the K. B., assigning the common errors. In the argument for the bishop, it was attempted to distinguish this case from the former decisions establishing the validity of such bonds, since those were between the obligor and the obligee, and this was between the patron and the bishop. But the court overruled this distinction; and, considering themselves bound by the current of authorities, in Michaelmas term, 1782, affirmed the judgment of the C. B. On this judgment of affirmance a writ of error was brought in the House of Lords, and for the plaintiff in error it was contended that the adjudged cases on the subject were inapplicable, none of them having arisen between parties in the same capacity, and under similar circumstances; that the bishop was authorized to judge, in the first instance, of the fitness or unfitness of a clerk, and that he had exercised such authority; that it was in the power of a patron, by a general bond of resignation, to sell a vacant living by certain and infallible means; that such a bond put the clerk under the power of the lay patron, instead of the authority of the bishop; that such a bond, in effect, converts a benefice, which cannot be directly conferred for a shorter period than for life, into an office at will of the patron; that it enables the patron and clerk to make a partition of the emoluments of the benefice; and that it is an *assurance of profit or benefit* to the patron, contrary to the stat. 31 Eliz. c. 6. On the part of the defendant in error it was answered, that the question was settled by the decided cases; that as to the possibilities of abuse of such bonds, when such illegal facts were alleged and proved, the bond could not be enforced, but that the courts did not interfere on possibilities; and that in the present case, the bond was a simple resignation bond, unattended with any such illegal circumstance. After hearing counsel, various questions were put to the judges, of whom eight were present. In answer to the questions, seven of the judges, viz., Heath, J., Buller, J., Nares, J., Willes, J., Gould, J., and the Lord Chief Baron, and Perrym, B., delivered their opinions that such a bond was not corrupt or illegal within the meaning of the statute, and that the presentation was not void. Eyre, B., gave his opinion to the contrary. After hearing the opinions, a debate and division ensued, and notwithstanding the opinions of the judges, the judgment of the K. B. was reversed by nineteen votes against eighteen.

Bishop of London v. Ffytche, 1 East, 487; 2 Bro. P. C. 211; 1 Bro. C. Ca. 95.

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Whether a bond conditioned to resign in *favour of a particular person* is void or not, has been much agitated. From the above case of Jones v. Lawrence, (antè p. 13,) it would appear to be valid; and this appeared the inclination of the judges in a late case, which, however, was decided on another ground. The defendant's father had a life estate in lands, &c., in Somersetshire, expectant on the decease of the father's brother without issue male; and the defendant was remainder-man in tail, expectant on such life estate. By agreement between the father and brother and the defendant, it was agreed to suffer a recovery, and that the estate should be limited to the defendant in fee, in consideration of a sum of money to be paid by him to his father, and also that in case certain livings belonging to the estate should become vacant during the lives of the defendant and his younger brother, the defendant should present his brother, if then qualified, or if not qualified, should present some other person *ad interim*, and procure such incumbent to resign on the defendant's receiving notice of his brother's qualification; and the defendant gave his father a bond conditioned for the performance of these several things. To an action of debt on this bond, the defendant set out on oyer the bond and condition reciting the agreement, and pleaded that the agreement was simoniacal. The plaintiff demurred, and the court on argument seemed to distinguish this case from the Bishop of London v. Ffytche, since this was not a *general* bond of resignation; but supposing it simoniacal as to the presentation of the son of the obligee, yet for the payment of the money it was exempt from vice; and at *common law* the good might be separated from the bad.(a)

Newman v. Newman, 4 Maul. & S. 66. ||(a) And this may also be the case where a deed is in part void under the operation of a statute; unless, indeed, the statute, (like the act against usury, &c.,) *expressly* render the deed void *to all intents and purposes*. 1 Marsh. 310; 6 Taunt. 369;|| Greenwood v. Bishop of London, 5 Taunt. 727; 1 Marsh. 292, S. C.

And upon this principle the following case was decided: The Rev. G. P., incumbent of the living of Bradwell juxta Mare, and also beneficial owner of the advowson, which was vested in his trustee, agreed with Sir H. B. D., for the sale of the advowson for a sum of money, and also that he should resign and present the vendee to the living. The bishop refusing the resignation, P., in order to effect the simoniacal purpose, granted a lease for ninety-nine years to Sir H. B. D. of the tithes and profits of the living, if P. should so long live, at a peppercorn rent. A conveyance was executed of the advowson from P.'s trustee, to a trustee for D. On P.'s death, the crown presented for that turn, on the ground of the simoniacal contract; and on the death of the crown's incumbent, the heir at law of P. disturbed the parties claiming under the conveyance of the advowson in their right of presentation. These parties declared against the bishop and the heir at law in *quare impedit*; and the case coming before the Court of C. B., on demurrer to the defendant's pleas, the court decided that the conveyance of the advowson was only void as far as regarded the next presentation, and the vendees, having forfeited that turn, were afterwards entitled to present under the conveyance.

Since the above decisions, the question as to special bonds of resignation has been set at rest, and it has been decided by the House of Lords, that there is no distinction between a bond conditioned for resigning generally on the request of the patron, and a bond conditioned to resign in favour of

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a particular relative of the patron; and a bond for resigning in favour of one of two brothers of the patron was held simoniacal and void.

Fletcher v. Lord Sondes, 3 Bing. R. 501; 1 Bligh R. 144, (new ser.,) reversing the judgments of B. R. and Cam. Scacc.

In consequence of this decision, two statutes have been passed on the subject, rendering such bonds valid to a certain extent, and under certain regulations.

By stat. 7 & 8 Geo. 4, c. 25, § 1, it is enacted, That no presentation, collation, gift, or bestowing any such spiritual office to or upon any spiritual person, *before the 9th day of April*, in the present year of our Lord 1827, nor any admission, institution, investiture, or induction thereupon, shall be void, frustrate, or of no effect in law, for or by reason of any such engagement made, given, or entered into by such spiritual person, or by any other person or persons, for the resignation of the same, to the intent or purpose manifested by the terms of such engagement, that some person specially named or described therein, or one of two persons so specially named or described, should be presented, collated, or nominated to such spiritual office, or that the same should be given or bestowed to or upon him, or for the resignation thereof, upon notice or request, or otherwise, when a person, or one of two persons, so specially named or described, should become qualified, by age or otherwise, to accept and take the same; and that it shall not be lawful for the king's most excellent majesty, his heirs or successors, for or by reason of such engagement, as aforesaid, to present or collate unto, or give or bestow such spiritual office; and that such spiritual person, and patron or patrons, or other person or persons respectively, shall not be liable to any pains, penalty, forfeiture, loss, or disability, nor to any prosecution or other proceedings, civil, criminal, or penal, in any court ecclesiastical or temporal, for or by reason of his, her, or their having made, given, or entered into or accepted or taken such engagement as aforesaid; and that every such presentation or collation, or gift or bestowing, *before the said 9th day of April*, in the present year of our Lord 1827, and every admission, institution, investiture, and induction thereupon, shall be as valid and effectual in the law, to all intents and purposes whatsoever, as if such engagement had not been made, given, or entered into, or accepted or taken; any thing in any act, statute, or canon, or any law to the contrary in anywise notwithstanding.

§ 2. Be it further enacted, That every such engagement which hath been made, given, or entered into at any time before the said 9th day of April, in the present year of our Lord 1827, for the resignation of any benefice with cure of souls, dignity, prebend, or living ecclesiastical, to the intents or purposes manifested by the terms of such engagement, that some person specially named or described therein, or one of two persons so specially named or described, should be presented, collated, or nominated to such spiritual office, or that the same should be given or bestowed to or upon him, or for the resignation thereof, upon notice or request, or otherwise, when a person, or one of two persons, so specially named or described, should become qualified, by age or otherwise, to accept and take the same, shall be good, valid, and effectual in the law, to all intents and purposes whatsoever; any thing in the said recited act, or in any other act, statute, or canon, or any law to the contrary in anywise notwithstanding.

§ 3. Provided always, That nothing in this act contained shall extend,

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or be construed to extend, to the case of any engagement which shall not have been made, given, and entered into, really and *bond fide* to the intent or purpose aforesaid, and no other: Provided also, that nothing herein shall be deemed compulsory upon the ordinary to accept the resignation.

§ 4. Provided always, and be it further enacted, That in every case where any such spiritual office shall, after the passing of this act, be resigned pursuant to any such engagement, and the person, or one of the two persons, so specially named or described therein, shall not be presented, collated, nominated, or appointed by donation to such spiritual office, within six calendar months next after such resignation, the resignation which shall so have been made pursuant to such engagement shall, to all intents and purposes, be void and of no effect; and the spiritual person who shall so have resigned shall, without any act or form, and as if such resignation had not been made, be deemed and taken, to all intents and purposes, to be, and to have continued the incumbent actually in possession of such spiritual office, notwithstanding such resignation; and although, within the said six months, any other person may have been presented, collated, nominated, instituted, or inducted thereto, or received investiture thereof, provided such person so resigning shall not, by reason of any other act or thing, become disqualified to hold the same.

§ 5. Provided also, and be it further enacted, That nothing in this act contained shall extend, or be construed to extend, to the case of any such engagement, upon or with respect to which any action, suit, bill, plaint, or information shall have been brought, sued out, or commenced and prosecuted before the 9th day of April in this present year.

By stat. 9 Geo. 4, c. 94, § 1, it is enacted, That every engagement by promise, grant, agreement, or covenant, which shall be really and *bond fide* made, given, or entered into, at any time *after the passing of this act*, for the resignation of any spiritual office, being a benefice with cure of souls, dignity, prebend, or living ecclesiastical, to the intent or purpose, to be manifest by the terms of such engagement, that any one person whosoever, to be specially named and described therein, or one or two persons to be specially named and described therein, being such persons as are hereinafter mentioned, shall be presented, collated, nominated, or appointed to such spiritual office, or that the same shall be given or bestowed to or upon him, shall be good, valid, and effectual in the law, to all intents and purposes whatsoever, and the performance of the same may also be enforced in equity: Provided always, that such engagement shall be so entered into before the presentation, nomination, collation, or appointment of the party so entering into the same as aforesaid.

§ 2. Provided always, and be it further enacted, That where two persons shall be so specially named and described in such engagement, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand nephew of the patron, or of one of the patrons of such spiritual office, not being merely a trustee or trustees of the patronage of the same, or of the person, or one of the persons, for whom the patron or patrons shall be a trustee or trustees, or of the person or one of the persons by whose direction such presentation, collation, gift, or bestowing shall be intended to be made; or of any married woman, whose husband, in her right, shall be the patron, or one of the patrons of such spiritual office; or of any other person in whose right such presentation, collation, gift, or bestowing shall be intended to be made.

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§ 3. And be it further enacted, That no presentation, collation, gift, or bestowing to or of any such spiritual office, of or upon any spiritual person, to be made after the passing of this act, nor any admission, institution, investiture, or induction thereupon, shall be void, frustrate, or of no effect in law, for or by reason of any such engagement so to be made, given, or entered into by such spiritual person, or any other person or persons, to or with the patron or patrons of such spiritual office, or to or with any other person or persons, for the resignation of the same as aforesaid; and that it shall not be lawful for the king's most excellent majesty, his heirs or successors, for or by reason of any such engagement as aforesaid, to present or collate unto, or give or bestow such spiritual office; and that such spiritual person, and patron or patrons, or other person or persons respectively, shall not be liable to any pains, penalties, forfeitures, loss, or disability, or to any prosecution, or other proceeding, civil, criminal, or penal, in any court, ecclesiastical or temporal, for or by reason of his, her, or their having made, given, or entered into, or accepted or taken such engagement as aforesaid; and that every such presentation or collation, or gift or bestowing, to be made after the passing of this act, and every admission, institution, investiture, and induction thereupon, shall be as valid and effectual in the law, to all intents and purposes whatsoever, as if such engagement had not been made, given, or entered into, or accepted or taken; any thing in an act passed in the 31st year of the reign of her late majesty Queen Elizabeth, intituled "An act against abuses in the elections of scholars and presentations to benefices," or in any other act, statute, or canon, or any law to the contrary, in any wise notwithstanding.

§ 4. Provided always, and be it further enacted, That nothing in this act shall extend to the case of any such engagement as aforesaid, unless one part of the deed, instrument, or writing by which such engagement shall be made, given, or entered into, shall, within the space of two calendar months next after the date thereof, be deposited in the office of the registrar of the diocese, wherein the benefice with cure of souls, dignity, prebend, or living ecclesiastical, for the resignation whereof such engagement shall be made, given or entered into, as aforesaid, shall be locally situate, except as to such benefices with cure of souls, dignities, prebends, or livings ecclesiastical, as are under the peculiar jurisdiction of any archbishop or bishop; in which case, such document as aforesaid shall be deposited in the office of the registrar of that peculiar jurisdiction to which any such benefice with cure of souls, dignity, prebend, or living ecclesiastical shall be subject; and such registrar shall respectively deposit and preserve the same, and shall give and sign a certificate of such deposit thereof; and every such deed, instrument, or writing shall be produced at all proper and usual hours at such registry, to every person applying to inspect the same; and an office copy of such deed, instrument, or writing, certified under the hand of the registrar, (and which office copy so certified the registrar shall, in all cases, grant to every person who shall apply for the same,) shall, in all cases, be admitted and allowed as legal evidence thereof in all courts whatsoever; and every such registrar shall be entitled to the sum of two shillings, and no more, for so depositing as aforesaid such deed, instrument, or writing, and so as aforesaid certifying such deposit thereof; and the sum of one shilling, and no more, for each search to be made for the same; and the sum of sixpence, and no more, over and besides stamp-duty, if any, for

(C) How Equity regards such Bonds.

each folio of seventy-two words of each such office copy so certified as aforesaid.

§ 5. And be it further enacted, That every resignation to be made in pursuance of any such engagement as aforesaid shall refer to the engagement in pursuance of which it is made, and state the name of the person for whose benefit it is made; and that it shall not be lawful for the ordinary to refuse such resignation, unless upon good and sufficient cause to be shown for that purpose; and that such resignation shall not be valid or effectual, except for the purpose of allowing the person for whose benefit it shall be so made to be presented, collated, nominated, or appointed to the spiritual office thereby resigned, and shall be absolutely null and void unless such person shall be presented, collated, nominated, or appointed as aforesaid within six calendar months next after notice of such resignation shall have been given to the patron or patrons of such spiritual office.

§ 6. Provided also, and be it further enacted, That nothing in this act shall extend to any case where the presentation, collation, gift, or bestowing to or of any such spiritual office as aforesaid shall be made by the king's most excellent majesty, his heirs or successors, in right of his crown or duchy of Lancaster; or by any archbishop, bishop, or other ecclesiastical person, in right of his archbishopric, bishopric, or other ecclesiastical living, office, or dignity, or by any other body politic or corporate, whether aggregate or sole, or by any other person or persons in right of any office or dignity; or by any company, or any feoffees, or trustees for charitable or other public purposes; or by any other person or persons not entitled to the patronage of such spiritual office as private property.||

(C) Of the power exercised over a Bond for resigning a Benefice by Courts of Equity.

If an improper use be made of a bond for resigning a benefice, relief may be had in a court of equity.

A perpetual injunction was granted, because it appeared that a bond for resigning a benefice had been made use of to prevent the incumbent from demanding tithes of his patron.

1 Vern. 411, *Durstun v. Sands*.

Upon a bill to be relieved against a judgment, obtained on a general bond for resigning a benefice, it appeared that the obligee had made an offer to the incumbent, that if he would give him seven hundred pounds, he should not be sued upon the bond. Satisfaction was ordered to be entered on the judgment, and a perpetual injunction was granted. A new bond of resignation in the penalty of two hundred pounds was decreed; but it was ordered that no action should be brought thereupon without leave of the court. The Lord Keeper said in this case, he did not know that such bond had ever been held good, except to preserve the benefice for the patron himself, or for a son or friend of his, or to prevent the non-residence, or to punish the vicious course of life of an incumbent; and that, although a bond be to resign generally, he would never allow it to be recovered upon, unless some such reason were shown for requiring a resignation; because a door would be thereby opened for simony.

Eq. Ca. Abr. 86, *Hilliard v. Stapleton*.

A bill being brought to be relieved against a judgment upon a bond for resigning a benefice, it was dismissed, upon the defendant's proving a misbehaviour in the incumbent.

Eq. Ca. Abr. 228, *Hodson v. Thornton*.

(D) Whether the penalty of a Bond for resigning be saved, &c.

In another case it is laid down, that a bond to resign a benefice upon request, shall not be made use of to turn out the incumbent, unless there be non-residence, or some gross misbehaviour; and that if any other use be made of the bond the court will grant an injunction.

Chan. Prec. 513, *Hawkins v. Turner*.

Capel, upon presenting Peele to a living, took a bond for resigning, when the patron's nephew, for whom the living was intended, should be of age. At his coming of age, it was agreed that Peele should continue to hold the living on paying the nephew thirty pounds a year. After having paid this seven years, Peele refused to pay it any longer. An action being hereupon brought upon the bond, Peele filed a bill in equity, wherein he prayed an injunction, and to have all the money repaid. An injunction was granted, not on account of the invalidity of the bond; but because an ill use had been made thereof. As to the money which had been paid, Peele was left to his remedy at law.

Stra. 534, *Peele v. Capel*.

[A patron having obtained judgment against the incumbent on a general bond of resignation, the latter filed a bill in equity for a discovery, whether the advowson was not sold with a promise to procure an immediate resignation. The defendant demurred to the discovery, as tending to subject him to the penalties of the statute against simony. But Lord Hardwicke overruled the demurrer.

Grey v. Heskett, Amb. 268.] || *Vide Bishop of London v. Ffytche*, 1 Bro. Chan. Ca. 95.||

(D) Whether the Penalty of a Bond for resigning a Benefice be saved, where the Ordinary has refused to accept a Resignation.

It is in one case said to be in the power of the ordinary to discourage the use of bonds for resigning benefices, for that he may refuse to accept a resignation made in pursuance of such bond.

Wats. Com. Inc. 24. || See *anté*, (B).||

In another case it is said, that the bishop refused to accept a resignation, offered in pursuance of a bond for resigning a benefice, and ordered the incumbent to continue to serve the cure; declaring that he never would countenance such unjust practices.

Chan. Prec. 513, *Hawkins v. Turner*.

In another case it is laid down that an ordinary is not obliged to accept a resignation in pursuance of a bond for resigning a benefice, unless there be some just cause for turning the incumbent out.

2 Chan. R. 398, *Durston v. Sands*.

In a late case a grant was made to a clerk of the two first of three benefices which should become void, provided he were capable, when they became void, of holding them. In order to make himself capable of taking one of these benefices, the clerk offered the resignation of another benefice to the ordinary, which he refused to accept. One question in this case was, Whether the ordinary was obliged to accept the resignation? It was insisted by Mr. Henley, upon one side, that no case can be adduced to show that the ordinary can arbitrarily refuse to accept a resignation of a benefice. Mr. Attorney Murray, who was on the other side, contented

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himself with saying, in answer to this, that the plainest points, having scarce ever been called in question, are supported by the fewest authorities. No decree was made as to this point; but as Lord Hardwicke intimated it once or twice pretty strongly to be his opinion that the ordinary ought to have accepted the resignation, he did afterwards accept it. (a)

MS. R. Marquis of Rockingham v. Griffith, E. 27 G. 2, in Chan. [(a) See this case in 3 Burn's E. L. 304—5, where it is said, that in the course of the former argument, the Chancellor held, *that it is in the power of the ordinary to accept or refuse a resignation.*—It seems to be clear, that the bishop may refuse to accept a resignation on a sufficient cause for his refusal; but whether he can merely at his will and pleasure refuse to accept a resignation without any cause, and who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept it, are questions undecided. In the case of the Bishop of London v. Ffytche, the Judges in general declined to answer the question proposed to them, whether the bishop was compellable to accept a resignation? one thought he was compellable by a *mandamus*, if he did not show sufficient cause; and another observed, if he could not be compelled, he might prevent any incumbent from accepting an Irish bishopric, as no one can accept a bishopric in Ireland, till he has resigned all his benefices in England. But Lord Thurlow seemed to be of opinion that he could not be compelled, particularly by *mandamus*, from which there is no appeal or writ of error. 3 Burn's E. L. 337, &c. Cuningh. Law of Simony.] [See Fletcher v. Lord Sondes, 3 Bingh. 544.]

What fell from Lord Hardwicke upon this occasion, is sufficient to render the authority of the two last cases very doubtful. This was not indeed the case of a bond for resigning a benefice; but it was a stronger case; for if the ordinary cannot refuse to accept a resignation, when the design in resigning is merely to take another benefice, it would be strange to hold, that he may refuse to accept a resignation, to be made at the request of a patron, in consequence of an agreement which it has been again and again determined, both at law and equity, the patron had a right to make.

If a new presentation to a benefice be made before the bishop has accepted the resignation of the incumbent, the presentation is void.

Cases in the time of Queen Ann. 276, Riley v. Adams, Noy, 147; Cro. Ja. 198.

If an obligor bind himself to resign a benefice, it is incumbent upon him to procure the ordinary's acceptance of his resignation.

Lutw. 693, Studholme v. Morrison.

In an action upon a bond, the condition appeared to be, that an incumbent should, within three months after the expiration of six years, to commence from the day of the date of the bond, at the request of the patron, his heirs, executors, administrators, or assigns, resign and deliver up a vicarage into the hands of the proper ordinary; whereby it may become vacant, and the patron, his heirs, executors, administrators, or assigns, may present anew. The defendant pleaded that he did, within three months after the expiration of the six years, offer to resign and deliver up into the hands of the proper ordinary the vicarage, for the ordinary to accept the same; whereby the vicarage might become vacant, and the patron might present anew; and that the ordinary did then refuse, and from thenceforth hitherto hath refused to accept the resignation. Upon a demurrer to this plea, it was holden to be bad; because it is not therein averred, that the bishop did accept the resignation; and by Rider, Ch. J., the defendant, by undertaking to resign, (b) so that the vicarage may become vacant, and the plaintiff may present anew, has undertaken for the bishop's acceptance of a resignation; which, according to what is laid down in Farne's case, Cro. Ja. 198, is necessary to the completion of a resignation.

Sayer, 185, Hesketh v. Gray; Ambl. 268, S. C. [(b) Lord Hardwicke expressed

(F) Forfeitures, Disabilities, and Punishments.

himself of the same opinion, as to this point, when this case came before him in Chancery, Ambl. 268.]

(E) Some objections to a Bond for resigning a Benefice considered.

THE result of the whole is, that a bond for resigning a benefice is good at law, and that courts of equity will restrain every improper use thereof.

|| But both general and special bonds of resignation have since been holden void. See *antè*, (B); and how far they are now rendered valid by the late acts, 7 & 8 G. 4, c. 22, and 9 G. 4, c. 94. See *antè*, (B,) p. 16.||

One objection to a bond for resigning a benefice is, that a corrupt patron may make an ill use thereof. It is a sufficient answer to this objection, that the use of a thing ought not to be discontinued because there is a possibility of its being abused.

Another objection to a bond for resigning a benefice, which is reported to have fallen from Holt, Ch. J., in the case of *Swain v. Carter*, Comb. 13, is, that a resignation-bond comes as near simony as possible; it being easy to procure a round sum of money, by making the penalty of the bond adequate to the value of the benefice, and agreeing privately that the money shall be paid. This, which would be an oblique way of selling a benefice, would be more than would come near, for it would be downright simony. If there be no other way, or not as easy a way to do the same thing, this objection would be insurmountable; but, if there be, the stopping of this would not prevent the mischief. The same clerk, whose conscience would allow him to do this, might as well advance the money agreed upon at first, or, if that did not suit him, give an absolute bond to pay the money at a future time. If this be so that the same crime may still be committed, and with as much secrecy, what good end would be answered by prohibiting such bonds, which may be made use of to punish the neglect of duty, or the immoral conduct of an incumbent, and for other good purposes?

[Vide 4 Term R. 78.]

Another objection to a bond for resigning a benefice is, that when a patron takes a bond of resignation, the presentation is only during pleasure. Be it so; and I will suppose, which is the utmost that can be supposed, that the bond is not taken with design to make the incumbent careful in the discharge of his duty, but to let some friend or relation afterwards into the benefice. It by no means necessarily follows, that the church, which is the great thing to be guarded against, will be therefore filled with an unfit person. If the successor, which may be the case, is better qualified for the ministerial office, the interest of religion will be advanced by the exchange. If he be not so well qualified, it is an evil: but it is that evil which, in the present circumstance of things, cannot be easily prevented.

||See Stillingfleet's Letter as to Resignation-Bonds, in his *Miscellaneous Discourses*, p. 57.||

(F) Of the Forfeitures, Disabilities, and Punishments incurred by Simony.

1. *By the Incumbent.*

THE person promoted in pursuance of a corrupt contract is at some times *simoniacus*; at other times *simoniacè promotus*. In the former case, wherein he is a party or a privy to the contract, he is liable to suffer more: but in the latter, although he be quite a stranger thereto, he is to a certain degree involved in the consequences of the contract. The design is, that if a

(F) Forfeitures, Disabilities, and Punishments.

sense of what becomes himself, and of the duty he owes to the public, will not restrain a patron from being guilty of simony, a regard for the person whom he means to serve may do it.

A *simoniacus* is liable to forfeit double the value of one year's profit of the benefice he has been presented to in pursuance of a corrupt contract; a *simoniacè promotus* is not liable to this forfeiture.

31 Eliz. c. 6, par. 5.

The double value, which is in any case forfeitable under the statute, is to be the double value of what the benefice could be let for, and not the double value as valued in the king's books.

3 Inst. 154.

Neither a *simoniacus* nor a *simoniacè promotus* can sue for tithes, the right thereto being taken away by the corrupt contract.

March, 84.

||And so it is laid down in Hobart, p. 168, that if the parson sue for tithes in the ecclesiastical court, or for his treble damages at the common law, the parishioners may plead him no parson because of simony. But, in an action for use and occupation of the glebe lands, the tenant cannot resist the claim on the ground that the plaintiff was simoniacally presented; nor in an action for composition money due on an agreement to pay a composition for tithes; for these cases fall within the principle that the tenant cannot dispute his landlord's title.

Cooke v. Loxley, 5 Term R. 4; Brooksby v. Watts, 6 Taunt. 333; 2 Marsh. 38. ||

It is laid down, that although a *simoniacè promotus* be deprived, he is not disabled from being presented again to the same benefice.

12 Rep. 100; 2 Roll. Rep. 465.

But it has been in one case holden, that a *simoniacè promotus* can never be presented to the same benefice again.

Cro. Ja. 533, Booth v. Potter.

If an incumbent take money for resigning or exchanging a benefice with cure of souls, he is liable to forfeit double the value of the money.

31. Eliz. c. 6, par. 8.

A person corruptly ordained is liable to forfeit ten pounds, and any benefice, living, or promotion ecclesiastical, which he shall accept within seven years after his having been ordained.

31 Eliz. c. 6, par. 10.

The disabilities incurred by simony cannot be dispensed with by a *non obstante*; for when a person is, for the good of the church or state, disabled by a statute, the king's subjects have an interest in the disability, and the king can no more dispense therewith than he can with a disability at the common law.

7 Inst. 154; 2 Hawk. c. 37, § 56.

The offence of simony is not pardoned by a general pardon.

Sid. 170.

Besides the forfeitures and disabilities already mentioned, a *simoniacus*, provided he has taken the oath against simony, is liable to be indicted and punished for perjury.

Dr. Watson indeed makes a question, whether, since the 13 Car. 2, c. 12, the oath against simony ought to be administered? It is by this statute

(F) Forfeitures, Disabilities, and Punishments.

enacted, "That it shall not be lawful for any archbishop, bishop, vicar-general, chancellor, commissary, or any other spiritual or ecclesiastical judge, officer, or minister, or other person having or exercising spiritual or ecclesiastical jurisdiction, to tender or administer to any person whatsoever the oath usually called the oath *ex officio*, or any other oath whereby such person may be charged or compelled to confess or accuse, or to purge him or herself of any criminal matter whereby he or she may be liable to any punishment or censure; any thing in this statute, or any law, custom, or usage heretofore, to the contrary hereof in anywise notwithstanding." The generality of the words, *any other oath*, being tied up by the subsequent words to an oath in certain cases, the thing to be considered is, whether the oath against simony is an oath, by which the person taking it is charged or compelled to confess or accuse, or to purge himself, of any criminal matter? No person does by this oath confess himself guilty or accuse himself of any criminal matter. So far from doing this, the taking of the oath is a denial in the most express terms of his having been guilty of a particular offence. Nor does any person by this oath purge himself of any criminal matter; for at the time of taking it he does not stand charged with any criminal matter. Upon the whole, the oath against simony does not seem to be within the words or purview of that statute.

Comp. Incum. 188.

2. *By the Patron.*

If a patron be guilty of presenting corruptly, the presentation shall be void, and the king may present for that turn; and the patron is moreover liable to forfeit the right of presenting upon the next avoidance, and likewise the double value of one year's profit of the benefice.

31 Eliz. c. 6, par. 5. ||Vide 5 Taunt. 727; 1 Marsh, 292; 8 Barn. & C. 25.||

But if A. have the right of presentation, and B. the right of nomination to a benefice, and only one of them be guilty of presenting corruptly, the right of the other shall not be thereby prejudiced, nor shall he be subject to any forfeiture.

Lane, 74, Calvert v. Kitchen.

If the usurper of a benefice be guilty of presenting corruptly, this shall not give the king a right to present for that turn; because it would be unreasonable to take away the right of a patron who has not been guilty of any offence.

3 Inst. 153.

The patron who has given money to procure the resigning or exchanging of a benefice is liable to forfeit double the value of the money.

31 Eliz. c. 6, par. 8.

3. *By the Ordinary.*

If an ordinary corruptly institute, instal, or place any person in a benefice, with or without cure of souls, he is liable to forfeit the double value of a year's profit of the benefice.

31 Eliz. c. 6, par. 6.

If an ordinary take a reward for the conferring of orders, or granting a license to preach, he is liable to forfeit forty pounds.

31 Eliz. c. 6, par. 10.

Besides being liable to the forfeitures, disabilities, and punishments

(G) When Advantage may be taken of Forfeitures, &c.

already mentioned, there is a proviso in the statute, that every person who shall be guilty of any offence against it shall be subject to all the punishments, pains, and penalties to which he was before subject by the ecclesiastical laws.

31 Eliz. c. 6, par. 9.

(G) In what Cases, and at what Time, Advantage may be taken of the Forfeitures and Disabilities incurred by Simony.

1. *By the King.*

If a patron have been guilty of presenting corruptly to a benefice, the presentation is void, and the right of presenting is for that turn in the king.

31 Eliz. c. 6, par. 5; ¶Doe d. Watson v. Fletcher, 8 Barn. & C. 25.¶

The corrupt presentation of an usurper does not, however, give the king a right of presenting for that turn; because it would be unreasonable to take away the right of the patron, who has not been guilty of any offence.

3 Inst. 153.

If there have been a presentation, in pursuance of a corrupt contract, the presentation is void, and the king may present for that turn.

But, if the presentee have been instituted and inducted, the king cannot take advantage of his having been corruptly presented, until he be removed by *quare impedit*; for although he be in *de facto* only and not *de jure*, the church is full until he be removed in a judicial way, or resign.

Cro. Ja. 385, King v. Bishop of Norwich and others.

¶However, it has lately been decided otherwise. The Court of King's Bench held, that where a clerk was simoniacally presented, and instituted, and inducted, and the king, on the ground of the simony, presented another clerk, who was instituted and inducted, the king's presentee might maintain ejectment for the benefice against the other clerk, since the church was void by reason of his simoniacal presentation.

Doe d. Watson v. Fletcher, 8 Barn. & C. 25.¶

A clerk who had been presented corruptly continued incumbent till his death, above thirty years after; yet it was holden that the king might present, for that as the church had never been full *de jure*, the king's right of presenting was not taken away.

Noy, 25, Winchcomb v. Pulleston; ¶Hob. 165, S. C.¶

After a benefice became vacant, A agreed to give B a sum of money for procuring C the patron to present D. The money was paid, and D being presented, enjoyed the living till his death. Afterwards E, to whom the right of presenting for the next turn belonged, presented F. In *quare impedit* there was judgment for the king, although neither E nor F were privy to the corrupt contract between A and B.

Lutw. 1090, Rex v. Bishop of Chichester and others.

By 1 W. and M. c. 16, § 2, it is enacted, "That after the death of the person simoniac or simoniacally promoted, the offence or contract of simony shall neither in pleading, nor in evidence, be alleged to the prejudice of any other patron innocent of simony, or of his clerk by him presented, upon pretence of lapse to the crown; unless the person simoniac or simoniacally

(H) Of the Jurisdiction of Spiritual Courts.

promoted, or his patron, was convicted of such offence at the common law, or in some ecclesiastical court, in the lifetime of the person simoniac or simoniacally promoted." By the same statute, § 3, it is enacted, "That no lease, really and *bonâ fide* made by any person simoniac or simoniacally promoted, for good and valuable consideration, to any person not being privy unto or having notice of such simony, shall be impeached or avoided by reason of such simony, but shall be good and effectual in law."

One moiety of the forfeitures for offences against the 31 Eliz. c. 6, is by § 10 of that statute given to the queen, her heirs and successors.

2. *By other Persons.*

If any person have been corruptly instituted, the benefice becomes void; and the person, in whom the right of presenting is, may present thereunto, in such sort as if the person so instituted had been dead.

31 Eliz. c. 6, par. 6.

No title to present by lapse can accrue upon any avoidance mentioned in the 31 Eliz. c. 6, until six months are expired after notice has been given of such avoidance by the ordinary to the patron.

31 Eliz. c. 6, par. 7.

This provision of the statute is agreeable to the canon law, by which lapse cannot run against the patron, until notice has been given him by the ordinary that the church is void.

Dyer, 293.

If two claim the right of presentation to a vacant benefice, and the ordinary be not named in a *quare impedit* brought to determine the right, it shall, if a judgment be not obtained within six months after notice given that the benefice is void, lapse to the ordinary.

2 Roll. Abr. 365, Abbot of York v. Bishop of Norwich.

By a judgment in *quare impedit* the incumbent is so removed, that the patron who recovers may present, although there be no sentence of deprivation: but the clerk against whom the judgment is obtained continues incumbent *de facto* until such presentation be made.

1 Roll. R. 62.

One moiety of the forfeitures, for having been guilty of offences against the 31 Eliz. c. 6, is by § 10 of that statute given to the person who will sue for the same.

||A party is not bound to answer a bill of discovery as to facts which will subject him to the forfeitures of simony.

Parkhurst v. Lowten, 1 Meriv. 391.||

(H) Of the Jurisdiction of Spiritual Courts in Simony.

SOME have been of opinion, and amongst these is the learned(a) author of the Codex, that only spiritual courts had before the statute a power to punish simony: but if, as it has been already observed, simony is an offence at the common law, there can be little doubt of its having been always punishable in temporal courts. It may be true in fact, that it was for the most part, or perhaps altogether, proceeded against in the spiritual courts. As the interest of religion is by this offence struck at in a more remarkable manner, this is not to be wondered at; and the less, if it be considered,

(I) Of the Pleadings in an Action upon the 31 Eliz. c. 5.

that in times antecedent to the statute, spiritual courts did, in some cases, wherein there was a concurrent jurisdiction, encroach upon, and in others entirely swallow up, the jurisdiction of the temporal. Although then it cannot at this time be made appear, that temporal courts did heretofore exercise any jurisdiction in simony, it does by no means necessarily follow that they had none.

(a) Cod. 839, 840.

By the statute a power is reserved to spiritual courts of inflicting such punishments, pains, and penalties, in all the cases therein mentioned, as by the laws ecclesiastical could before the making thereof be inflicted.

31 Eliz. c. 6, § 9.

It has been holden, that the sentence of a spiritual court in simony, it being a matter properly triable there, is to be taken to be true, although in its consequence it divest the incumbent of his freehold.

Cro. Eliz. 788, *Baker v. Rogers*.

If a man have been acquitted upon a charge of simony in a temporal court, a spiritual court may re-examine the matter.

Comb. 73, *Boyle v. Boyle*.

Upon a motion for a prohibition to a suit in a spiritual court for tithes, upon the ground that the incumbent, being a simoniac, had no right thereto; it was holden, that a prohibition does not lie; and by the court: simony may be more aptly tried in the spiritual court.

Cro. Eliz. 642, *Risby v. Wentworth*. [Vide 3 Phill. Ecc. Rep. 171.]

(I) Of the Pleadings in an Action upon the 31 Eliz. c. 5.

THE possession of a benefice, to which an incumbent has been simoniacally promoted, may be recovered by an assize of *darrein presentment*, or by an action of *quare impedit*. The latter is usually preferred; because, besides being a shorter way of proceeding, the right of presentation as well as the right of advowson is thereby recoverable.

It is not enough to allege in the declaration in an action of *quare impedit*, that the plaintiff, or the person under whom he claims, is seised of the advowson; but a presentation must be alleged by him or some person under whom he claims; for unless a past presentation has been joined to the title, it does not appear that the right of presentation is now in the plaintiff.

Vaugh. 57, *King v. Bishop of Worcester and others*.

The declaration, in an action of *quare impedit* upon the statute, is good, although there be no recital of the statute: but it was formerly the practice, and it is as well to recite it.

Lutw. 1090. [The modern and better practice seems to be not to recite it. Vide 1 H. Bl. 376; 1 East, 487; 3 Chitty on Pleading, 586.]

Nor is there any danger in reciting the statute; a misrecital not being fatal.

Cro. Eliz. 788, *Baker v. Rogers*. [*Sed quære*, for where a person not bound to recite a statute will yet hazard a recital, if he errs, according to modern resolutions, it is fatal. And note, in the principal case, no objection was taken to the misrecital.]

It is not enough to aver in the declaration, in an action of *quare impedit* upon the statute, that the incumbent is a simoniac: but as the word *simony*

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is not in the statute, some simoniacal act which brings him within it must be shown.

Comb. 108, *Betts v. Lowe*.

At the common law the patron must be named in a writ of *quare impedit*, for as the incumbent could not allege any thing which concerned the right of patronage, it would be unreasonable to name only a person who could not defend the right of patronage: but as the incumbent is, by the 25 Ed. 3, c. 7, enabled to plead his patron's right of patronage in defence of his incumbency, it is not now necessary to name the patron, unless his right of inheritance will be affected by the judgment.

7 Rep. 26, *Hall's case*; 3 Lev. 16.

An incumbent cannot plead his patron's right of patronage, without showing that he is parson imparsonnee of the presentation of his patron.

7 Rep. 26, *Hall's case*.

An incumbent is not parson imparsonnee as against the king, unless he have been admitted, instituted, and inducted; but admission and institution will make him so as against any other person.

7 Rep. 26, *Hall's case*.

At the common law the ordinary could only plead, that he does only claim as ordinary; but since the statute of 25 Ed. 3, c. 7, he may plead a title in himself by lapse, or that the right of patronage is in him.

If *ne disturba pas*, which is in effect the general issue, be pleaded in an action of *quare impedit*, it amounts to a confession of the right of patronage, and only defends the wrong with which the defendant is charged; and consequently the plaintiff may pray immediately a writ to the ordinary, or he may proceed in the action in order to recover damages for the disturbance.

Hob. 162, *Rolt and another v. The Bishop of Litchfield*.

SLANDER.

SLANDER is the publishing of words in writing or by speaking; by reason of which the person to whom they relate becomes liable to suffer some corporal punishment, or to sustain some damage.

§ This definition is extremely defective. To constitute slander, malice is required, for otherwise a person might be guilty of slander who testified to the truth. The words must also be false, otherwise they may be justified. The means used to commit the offence are not only writing or speaking, but printing or signs. See *Bouv. L. D. h. v. §*

§ Words which impute an offence against morality, are not actionable, unless the offence be indictable, or induce some legal disability.

Harvey v. Boies, 1 Penns. R. 12.º

It is no excuse *in foro conscientie*, that the slanderous words which have been spoken or written are true; although the law, in compassion to men's infirmities, (a) allows it to be a justification in an action for words. If a man have been guilty of any thing which the law prohibits, he is liable to

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answer for it in a legal way; but it can answer no good purpose for a private person to accuse him of it; and there is a degree of cruelty in so doing. To rally a man for a foible or failing, if it be done with humour, and in a friendly way, may do him service: but the publishing of a foible or failing, which can serve only to lessen a man in the esteem of his neighbours, or to make him an object of ridicule, should be abstained from; for although it may not amount to slander in the legal notion of that word, it must create ill blood.

[(a) It is not in compassion to men's infirmities that the law allows the truth of words to be a justification in an action, but because, if the words spoken are true, the individual of whom they are spoken can complain of no *injury*. In one case Lord Camden is reported to have said, that if words are true they are *no slander*, but may be justified. 2 Wils. 301. But surely this is taking the word slander only in its ordinary acceptation, as signifying merely the circulation of mischievous *falsehoods*. For *malicious* slander, and the slander must be malicious to found a legal proceeding, is the relating of either truth or falsehood, for the purpose of creating misery; for truth may be made instrumental to the success of malicious designs as well as falsehood. See Paley's Phil.]

Slander in writing has at all times, and with good reason, been punished in a more exemplary manner than slanderous words; (a) for, as it has a greater tendency to provoke men to breaches of the peace, quarrels, and murders, it is of much more dangerous consequence to society. Words, which are frequently the effect of a sudden gust of passion, may soon be buried in oblivion; but slander, which is committed to writing, besides that the author is actuated by more deliberate malice, is for the most part so lasting as to be scarce ever forgiven.

[(a) Hence a libel is punishable both criminally and by action, when speaking the words would not be punishable in either way; for speaking the words *rogue* and *rascal* of any one, an action will not lie; but if those words are written and published of any one, an action will lie: if one man should say of another, *he has the itch*, without more, an action would not lie: but if he should write those words of another, and publish them maliciously, no doubt but the action well lies. Per Gould, J., 2 Wils. 204.] {1 Bos. & Pul. 331; Bell v. Stone.}

For written slander, (b) the party injured may proceed against the author by indictment or information, it being considered as a public offence; he may likewise proceed by an action upon the case for the damage sustained, and he may in some cases institute a suit in a spiritual court.

Ld. Raym. 812. [(b) The Roman law of slander was far more severe than our own as it is now settled. The offence, though inferior to that of libel, *famosus libellus*, was, like all other *injuriæ*, the subject of a criminal as well as a civil proceeding. The highest and most common species was the "*convicium*," which is defined, "*quando quis in celebri loco civitatis injuriam mihi infert, ita ut concursus inde fiat hominum*." Huber. Præl. lib. iv. tit. 4. The word, according to Ulpian, coming from "*conventu*" or "*collatione vocum*," quasi "*convocium*," it answers rather to *abuse*, contumelious railing, than to our word *slander*; and in this sense it is used by Juvenal, Sat. iii. 237, and by Horace, Sat. lib. 1, 5, and 7. To constitute the offence of "*convicium*" there must be an assembly of persons, the contumely must be vociferated, it must be *contra bonos mores*, and to the defamation of a particular individual. The epithets *latro*, *adulter*, *sacrilegus*, *cornutus*, *delator*, *meretrix*, or simply giving the lie, &c., &c., amounted to the offence; and many expressions, not attended with the circumstances necessary to bring them within the description of *convicia*, were *injuriæ verbales* punishable in the same manner; as simply calling a freeman one's slave; calling a person who owed nothing one's debtor; or any solicitation of the chastity of a female, provided she was in the dress of a matron or virgin, and not *in veste ancillari aut meretriciâ*. Dig. lib. xlvii. tit. 10, l. 11, 15. The object of our law of verbal slander is the protection of reputation. Though this entered into the scope of the Roman law, yet it seems still more to have looked to the prevention of broils, and the preservation of the peace. The

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aspersion or contumely in order to be criminal must be public, *ita, nempe, si inde rumor publicus oriatur*. *Secreta obtreclatio* (private slander) was not cognisable by the law; and though the injury of *convicium* might be committed by persons collected at a person's house in his absence, it does not appear that any calumny or aspersion short of *convicium* was punishable unless addressed to the party in his presence. When the slander imputed to the party a crime or criminal propensity, the exposure of which was for the public good, the truth of the slander justified the utterer; for *peccato nocentium nota esse et oportere et expedire*. With us the justification of truth is admitted, on the principle that a party cannot sustain an injury by the truth being spoken of him. Where the imputation was only of some personal infirmity or quality, as lameness, deformity, poverty, &c., the truth was no excuse. Inst. Jur. Civ. lib. iv. tit. 4. Dig. lib. 47. tit. 10. Vinn. Comm. Inst. Just. lib. iv. tit. 4. Hub. Prælect. Jur. Civ. tom. 1. l. 4, tit. 4.¶

Peers, and the great men of the realm, besides these methods of redress, have another by an action of *scandalum magnatum*, which is peculiar to themselves.

If the slander be by words spoken, there is in general no other remedy than by an action upon the case or a suit in a spiritual court; yet, in certain cases, the speaker of slanderous words may be proceeded against as a criminal. For instance, if the words be a slander upon the state, as saying the coin is abased by authority, or saying any thing whereby the state may be prejudiced; or if they be a slander which it more particularly concerns the public to prevent, as speaking any thing slanderous to a justice of peace in the execution of his office, the slanderer may be proceeded against by indictment or information.

The criminal methods of proceeding against a slanderer having been treated of under the titles "INDICTMENT" and "INFORMATION," and the method of proceeding by action of *scandalum magnatum* under its proper title, it only remains to consider that sort of slander for which the remedy is by an action upon the case or by a suit in a spiritual court.

For the better understanding whereof it will be proper to consider,

(A) In what Cases an Action for Words in the general lies.

(B) What Words are in themselves actionable.

1. *Words which import the Charge of a Crime.*

1. Of Treason.
2. Of Murder.
3. Of Perjury.
4. Of Forgery.
5. Of Theft.
6. Of another crime.

2. *Words which import the Charge of having a contagious Distemper.*

3. *Words which are disgraceful to a Person in an Office.*

1. To a Person in a judicial Office.
2. To a Person in an Office of Trust.

4. *Words which are disgraceful to a Person of a Profession or Trade.*

1. To a Clergyman.
2. To a Physician or a Surgeon.
3. To a Barrister or an Attorney at Law.
4. To a Person professing an Art.
5. To a Tradesman.

56. *To the Character and Standing of a Person.*g

- (A) In what Cases an Action for Words in the general lies.
- (C) Some Words which become actionable by reason of the Damage received from them.
- (D) Certain Circumstances which are to be regarded in the Construction of Words.
1. *The Time when the Words were published.*
 2. *The Place where the words were published.*
 3. *The Language the Words were published in.*
 4. *The Occasion of publishing the Words.*
 5. *The Intention in publishing the Words.*
- (E) In what Cases slanderous Words published in a Course of Justice are actionable.
- (F) In what Cases Words in the past or future Tense are actionable.
- (G) How far Words must be affirmative, in order to render them actionable.
- (H) How far Words must be certain, in order to render them actionable.
- (I) By what Means the Want of Certainty, sufficient to render Words actionable, may be supplied.
1. *By the Intention of the Speaker.*
 2. *By an Averment.*
- (K) In what Cases doubtful Words are to be construed *in mitiori sensu*.
- (L) In what Cases doubtful Words are not to be construed *in mitiori sensu*.
- (M) In what Cases adjective Words are actionable.
- (N) In what Cases Words which import only an Intent are actionable.
- (O) In what Cases disjunctive or copulative Words are actionable.
- (P) In what Cases an Action does not lie, by reason of Repugnancy in the Words.
- (Q) In what Cases an Action lies for repeating Words which were published by another Person.
- (R) In what Cases actionable Words are rendered not actionable; or Words not actionable are rendered actionable, by subsequent Words.
- (S) Of the Pleadings in an Action for Words.
1. *In the General.*
 2. *In what Cases an Averment is necessary.*
 3. *In what Cases a Colloquium is necessary.*
 4. *What is the use of an Innuendo.*
 5. *What may be pleaded in Justification of Words.*
- (T) In what Kinds of slanderous Words Spiritual Courts have jurisdiction.
- (U) In what Cases a Prohibition lies to a Suit in a Spiritual Court for Words.
1. *Where actionable Words are coupled with Words which are a spiritual Defamation.*
 2. *Where a temporal Damage has been received from Words which are a spiritual Defamation.*
 3. *Where the Words, which are a spiritual Defamation, import a Charge of an Offence not comusable in a Spiritual Court.*

(A) In what Cases an Action for Words in the general lies.

AN action upon the case lies for the publishing of any words, by reason of which the person to whom they relate receives any damage; but it is not always necessary to show the damage received. The distinction is, that where the natural consequence of the words is a damage; as, if they import a charge of having been guilty of a crime, or of having a contagious distemper; or, if they are prejudicial to a person in an office, or to a person of a profession or trade, they are in themselves actionable: In other cases,

(A) In what Cases an Action for Words in the general lies.

the party, who brings an action for words, must show the damage which was received from them.

[There are two general rules for determining whether words are actionable. The first is, that the words must contain an express imputation of some crime liable to punishment, some capital offence or other infamous crime or misdemeanor; and the charge upon the person spoken of must be precise. The other is, if the words may be of probable ill consequence to a person in a trade, a profession, or an office.—These are the two general rules which have usually governed cases for scandalous words. There must be some certain or probable temporal loss or damage to make the words actionable. No imputation of the breach of legal or moral obligation, unless enforced by temporal sanctions; no charge of the want of chastity, unless under special circumstances, 1 Lev. 134, will be sufficient to found an action. 3 Wils. 186; 2 Bl. R. 752; 6 Term R. 694.] *See* Chadwick v. Briggs, 13 Mass. 248; Bloss v. Tobey, 2 Pick. 320; Stevenson v. Hayden, 2 Mass. 406.

In Ohio, it is not actionable to say, “I understand you are going to marry Barrett’s daughter. I am sorry that you should, for they are akin to negroes.”

Barrett v. Jarvis, 1 Ohio, 83.

It makes no difference whether the slander be published in writing or print, or by speaking; for although the party injured may, where it is in writing or print, this being a public offence, proceed in a criminal way against the author, he is not thereby precluded from obtaining satisfaction by an action for the injury to himself.

4 Rep. 14, Buckley v. Wood; 3 Leon. 138; Cro. Eliz. 247.

The writing of slanderous words in a private letter to a third person is a publication of the words.

2 Vent. 28, King v. Lake. {1 Bos. & Pul. 331, Bell v. Stone. *Aliter* if the words are contained in a sealed letter to the plaintiff himself. 1 Cain. 581, Lyle v. Clason; 2 Esp. Rep. 625, Phillips v. Jansen.}

A letter written with express malice or without probable cause by a member of a school district to the school committee, accusing a teacher of want of chastity, and remonstrating against her appointment, is actionable.

Bodwell v. Osgood, 3 Pick. 379.

If the words be only a spiritual defamation, ||by which is meant such a defamation as the spiritual courts only take cognisance of,|| an action does not lie; the remedy being by a suit in a spiritual court.

1 Roll. Abr. 34, Matthew v. Crose; 4 Co. 20; Cro. Ja. 323.

But, if a temporal damage have been received from words, which are a spiritual defamation, or if such words are coupled with others which are actionable, a prohibition lies to a suit in a spiritual court for the words. It would be vexatious, if the publisher of such words could be proceeded against both in a temporal and spiritual court; and, as only a temporal court can make the injured party satisfaction for the damage sustained, the proceeding in a spiritual court being *pro salute animæ* only, it is not reasonable that he should proceed in both courts.

2 R. 17, 20, 21; Carth. 213; Salk. 552; Comb. 138, 392; Sid. 214.

When the charge is not palpably unfounded, on the face of it, the risk of a prosecution which it induces shall be compensated in damages.

Deford v. Miller, 3 Penns. R. 105. *See* Carter v. Andrews, 16 Pick. 1; Stone v. Clark, 21 Pick. 51.

(B) What Words are in themselves actionable.

The action for slander is transitory.

Stout v. Wood, 1 Blackf. 72 : Offut v. Earlywine, 4 Blackf. 460 ; Linville v. Earlywine, 4 Blackf. 470. *g*

(B) What Words are in themselves actionable.

1. *Words which import the Charge of a Crime.*

As no greater injury can be done to a person than to accuse him of a crime for which he may be brought into danger of suffering corporal punishment, words which import such accusation have always, and with the highest reason, stood first in the list of those which are in themselves actionable.

{ Words actionable in themselves are not the less so because they are alleged to have been spoken of one as a candidate to serve in parliament. 4 Bos. & Pul. 47, Harwood v. Astley. }

^β The words, "he is a returned convict," are actionable, as importing that the punishment had been suffered, the obloquy remaining.

Fowler v. Dowdney, 2 M. & Rob. 119. *g*

1. Of Treason.

An action lies for speaking these words of J S, *Thou art a rebel ; || all that keep thee company are rebels ; and thou art not the queen's friend. ||*

Cro. Eliz. 638, Reistone v. Elliot ; 1 Roll. Abr. 49.

So, for speaking these words, *Thou art an enemy to the state ;* for they are a very great slander, if not a charge of treason.

Cro. Eliz. 602, Charter v. Peter.

So, for publishing these words, *He did treason in the Low Countries ;* because a person may be tried and punished in England for treason in the Low Countries.

1 Roll. Abr. 63, pl. 32 ; 35 H. 8, c. 2.

It is said that an action lies for publishing these words of J S, *He is a Jacobite, and is for bringing in the Prince of Wales and popery, to the destroying of our nation ;* because they import a charge of evil principles.

Salk. 696, How v. Prinn.

In another report of the same case, these words are said to be actionable, if published of a person in an office ; but it is not said that they are so when published of a private person.

The doctrine of the report of this case in Salkeld is recognised in a subsequent case in 18 Geo. 1, in which it is laid down that an action lies for publishing the following words of any person : *He had the Pretender's picture in his room, and I saw him drink his health. And he said he had a right to the crown.*

8 Mod. 283, Fry v. Corne.

2. Of Murder.

An action lies for saying to J N, *Thou hast killed a man ;* for, although no particular man be named, this is a great slander.

1 Roll. Abr. 77, Cooper v. Smith.

So, for saying, *You have killed the servant of J S,* or, *You have stolen the horse of J S,* although it be not shown that J S had a servant or a horse ; for, until the contrary be shown, this shall be intended.

Cro. Ja. 423, Cooper v. Smith ; 1 Roll. Abr. 77.

It was heretofore holden, that an action did not lie for publishing words

(B) What Words are in themselves actionable.

which import a charge of murder, without an averment, that the person said to be murdered is dead; but the latter and better opinion is, that the person shall be intended to be dead, unless it appear upon the record that he is alive.

1 Ventr. 117, Phillips v. Kingston; Cro. Ja. 489; Sid. 53; Cro. Eliz. 569.

2 The words, "You have killed A B," are actionable, although it appears in evidence by the plaintiff's witnesses that A B was alive at the time of speaking of the words.

Eckart v. Wilson, 10 S. & R. 44. See Deford v. Miller, 3 Penns. R. 105.

3. Of Perjury.

No action lies for publishing these words of J S, *He is forsworn*, unless it be added, in a judicial proceeding: but it does for publishing these words, *He is perjured*; for these words shall be intended to mean, that he is forsworn in a judicial proceeding.

4 Rep. 15, Stanhope v. Blith; 2 Bulstr. 150; 3 Inst. 166. {8 East, 427, Hawkes v. Hawkey; 1 Cain. 347, Hopkins v. Beedle; 2 Cain. 91, Green v. Long; 1 Johns. Rep. 505, Stafford v. Green; 2 Dall. 58, Rue v. Mitchell; 1 Bin. 537, Shaffer v. Kintzer; 2 Bin. 60, Packer v. Spangler.}

{And an action lies for saying of another, "You swore to a lie, for which you now stand indicted." These words can mean nothing less than perjury; for they allege that the plaintiff had sworn to such a lie as made him liable to an indictment, which could only be for perjury.

3 Cain. 73, Pelton v. Ward.

Also saying of the plaintiff, "He is under a charge of a prosecution for perjury; G. W. (an attorney) had the attorney-general's directions to prosecute him for perjury," is actionable.

9 East 93, Roberts v. Camden.}

{And words are now to be taken in their plain and popular acceptance; therefore, where defendant said of plaintiff that "he was under a charge of perjury, and that G. W. had the attorney-general's directions to prosecute the plaintiff for perjury:" the words were held actionable; for after verdict the words, not being justified, must be taken to be false, and must be understood to mean that the plaintiff was ordered to be prosecuted for a perjury which he had committed.

Roberts v. Camden, 9 East, R. 93; and see p. 32.}

Ecclesiastical courts are not mentioned in the statute of the 5th of Eliz. against perjury; yet it has been holden, that an action lies for publishing these words of J S, *He is forsworn in an ecclesiastical court*.

Cro. Eliz. 609, Shaw v. Thompson. [Qu. ?]

An action lies for publishing these words of J S, *He was forsworn before a justice of peace*; for this offence, if not within the words, is certainly within the purview of the statute.

3 Lev. 166, Gruneth v. Derry.

An action will lie for publishing words which import a charge of perjury, although it be not a perjury within the statute; for perjury is an offence punishable at the common law.

1 Roll. Abr. 39, Pruer v. Moadman; 3 Inst. 164.

No action lies for publishing these words of J S, *He has forsworn himself in Leake court*, without showing that this is a court which could compel the taking of an oath.

1 Roll. Abr. 39, Law v. Bennett; 3 Inst. 166.

(B) What Words are in themselves actionable.

β In slander, words will be considered as bearing the same signification which they have in common parlance; therefore, to say of any one *he has sworn false in court*, implies that *he has committed perjury*.

Hamilton v. Dent, 1 Hayw. 116. See Studdard v. Linville, 3 Hawks, 474; Hamilton v. Smith, 2 Dev. & Bat. 274; Chaddock v. Briggs, 13 Mass. 248; Bloss v. Tobey, 2 Pick. 320.

Where the defendant said that the plaintiff had sworn to a lie in a certain case before a justice of the peace, of which the justice had no jurisdiction, no action lies, because perjury could not have been committed.

Boling v. Luther, N. C. Term, R. 202. See Brown v. Dula, 3 Murph. 574; McDonald v. Murchison, 1 Dev. 9; Kincade v. Bradshaw, 3 Hawks, 63.

To charge a person with having taken a false oath before an arbitrator, is actionable in itself.

Lyman v. Wetmore, 2 Conn. 42.

To say that plaintiff gave false evidence under oath, administered by a justice of the peace, before a church convened for the purpose of administering discipline among its members, is actionable without any averment or proof of special damages.

Chapman v. Gillet, 2 Conn. 40.

The words "She swore a false oath, and I can prove it," are not actionable, nor are the words helped by an innuendo of perjury.

Packer v. Spangler, 2 Binn. 60; Shaffer v. Kintzer, 1 Binn. 537.

To say of another "he swore me out of a sum of money," without any thing else, is not actionable.

Tipton v. Kahle, 3 Watts, 90.

{So, to say of a person "he has taken a false oath against me in Squire Jamison's court" is not actionable.

2 Johns. Rep. 10, Ward v. Clark; but see 2 Dall. 58, Rue v. Mitchell.}

Nor does an action lie for saying to J S, *Thou wast forsworn before the Bishop of Norwich*; because it does not appear to have been before him in his court, and it shall not be intended that it was.

1 Roll. Abr. 69, Keble v. Page.

{In an action for saying of another, "he is perjured," it is enough to prove the words spoken, and that they refer to the plaintiff. If it appear that they were spoken with reference to the plaintiff's giving testimony in an inferior court, it must be intended to be a court of competent jurisdiction. The *onus* lies on the defendant to show that it was otherwise.

2 Cain. 91, Green v. Long.}

An action does not lie for publishing these words of J S, *He hath delivered false evidence and untruths in his answer to a bill in Chancery*; for, as some things in a bill in Chancery are not material to what is in dispute between the parties, it is no perjury, although such things are not truly answered.

1 Roll. Abr. 70, Mitchell v. Brown; 3 Inst. 167; ¶sed vide Hawkes v. Hawkey, 8 East, 427, *contra*.¶

¶And saying of a man he is *forsworn* is not actionable, without showing that the words were spoken with reference to some judicial proceeding in which the plaintiff had been sworn.

Holt v. Scholefield, 6 Term R. 691.

(B) What Words are in themselves actionable.

Where the plaintiff averred that he had duly put in his answer on oath in the Exchequer, but averred no *colloquium* respecting such answer; and then alleged that defendant said of him he was forsworn,—innuendo, that plaintiff had perjured himself in his said answer,—the judgment was arrested; for this innuendo could not, without the aid of a *colloquium*, enlarge the sense of the words by referring them to the answer.

Hawkes v. Hawkey, 8 East, 427.¶

Where the declaration charged that the defendant said of the plaintiff, “He swore a lie and I can prove it,” and there was no *colloquium* of judicial proceedings, held that the words were not actionable.

Browne v. Dula, 2 Murph. 574.¶

No action lies for publishing these words of J S, *He is detected of perjury*; for a man who is not guilty of a crime may be detected; and it may be said of every man, against whom a bill of indictment is preferred for a crime, that he is detected of that crime.

4 Rep. 16, Weaver v. Cariden; Cro. Car. 268.

It is in one case said, that an action does not lie for publishing words which import a charge of subornation of perjury, unless it be averred, that the perjury was committed; for that the hiring of a man to commit a perjury is no offence, unless the perjury have been committed.

1 Roll. Abr. 51; Harris v. Dixon, Pasch. 3 Jac.

But, in another report of the same case, (for it appears to be the same, although reported as of a different year,) it is said to have been holden, that such words, which are a great imputation, are actionable, although it be not alleged that the perjury was committed.

Cro. Ja. 158, Harris v. Dixon; Pasch. 5 Jac.

The doctrine of the last-mentioned report was confirmed in a case some years after; it being there holden, that an action lies for publishing these words of A, *He gave 10l. to B for forswearing himself in Chancery*; and it is in this case said, that it shall be intended there was a subornation of perjury.

1 Roll. Abr. 41, Ewer's case, M. 9 Car.

In speaking of an affidavit made by the plaintiff, the defendant said, “to this affidavit there stands opposed the oaths of two respectable men; and I would ask the people to name the *offence* of what he is *guilty*. In law it would be called *perjury*.” It was proved that the affidavit referred to had been made before the prothonotary in *vacation*. Held that the words were nevertheless actionable.

Deford v. Miller, 3 Penns. R. 103.

“You have taken a false oath before Squire Rush,” innuendo, “that the plaintiff had committed perjury in an oath taken by him before William Rush, Esq., one of the justices,” in a cause before him depending, was holden actionable after verdict.

Rue v. Mitchell, 2 Dall. 58. See 1 Binn. 548; 2 Watts, 41.

Where the defendant said to the plaintiff, “you have taken a false oath in a suit against me, in a suit before H, and sworn me out of money,” innuendo, “that in a suit against the defendant before P H, *Esquire*, he the said plaintiff had sworn falsely and committed perjury,” without averring

(B) What Words are in themselves actionable.

expressly that P H was a justice of the peace, the plaintiff was held entitled to recover.

Call v. Foresman, 5 Watts, 331.

In a suit before a justice of the peace, a witness who had just finished his examination, when the plaintiff turned towards him and said to him, "You have sworn a manifest lie;" held, that the words were actionable.

Kean v. McLaughlin, 2 S. & R. 469.

"You have sworn to a lie, for which you stand indicted," is actionable, being equivalent to a charge of perjury.

Pelton v. Ward, 3 Caines, 91.

It is actionable to say to a witness while giving his testimony to a material point, "that is a lie," if spoken maliciously.

McGlaughry v. Wetmore, 6 Johns. 82.

To charge the plaintiff with having perjured himself as one of the overseers of the town of W, is actionable.

Hopkins v. Beedle, 1 Caines, 347.

To say of another, "You swore false in court," is actionable; as it will be understood of false swearing in a court having power to administer oaths.

Hamilton v. Dent, 1 Hayw. 116.g

4. Of Forgery.

An action lies for publishing any words which import the charge of such forgery, as is within the meaning of any statute against this offence.

So, for charging a man with forgery, although it be not such forgery as is within the meaning of any statute against this offence; forgery being punishable at the common law.

1 Roll. Abr. 66, Pudsey v. Pudsey; 1 Roll. Abr. 65, Garbut v. Bell.

But no action lies for publishing these words of J S, *He hath forged the hand of J N*; for, unless it had been said to what deed, instrument, or writing the hand was forged, these words are too general to import the charge of such forgery as is punishable under any statute, or at the common law.

3 Leon. 231; 1 Roll. Abr. 65, pl. 4. [But this case was overruled by the Court of Common Pleas in the case of Jones v. Herne, 2 Wils. 87, and these words, *You are a rogue, and I will prove you a rogue, for you forged my name*, were holden to be actionable.]

||And it is not slander to say of a man, "I will take him to Bow Street on a charge of forgery;" for the words do not charge the person of whom they are spoken with felony, but merely with a suspicion of felony. Where defendant, having got a warrant against plaintiff for a tortious conversion of goods, said to A B with reference to the warrant,—“I have got a warrant for P: I will advertise a reward of twenty guineas to apprehend him; I shall transport him for felony;” Lord Ellenborough held it a question for the jury, whether defendant meant substantively to impute felony to plaintiff.

Harrison v. King, 4 Price, 46; 7 Taunt. 431; Tempest v. Chambers, 1 Stark. Ca. 67; Stark. on Slander, v. 1, 66, (2d ed.)||

§To charge the plaintiff with having forged a letter in defendant's name containing this clause, "I have to inform you that I have received your money, and want you to come and receive it," is slanderous, because it is

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a forgery at common law to counterfeit any writing with a fraudulent intent, whereby another may be prejudiced.

Ricks v. Cooper, 3 Hawks, 587.

To say of and concerning the plaintiff, "You forged a pass for Mrs. Padlock's negro, and persuaded him to run away," is actionable.

Purcell v. Archer, Peck's R. 317.

{An action cannot be maintained for saying of a merchant "he has brought a false bill of lading for half the cargo (meaning the lading of a particular ship) already," whereby he was injured as such merchant, and lost the confidence of several persons, (without naming them.) For the words do not impute any crime, as they do not charge him with a knowledge of the forgery.

3 Bos. & Pul. 372, Feise v. Linder.}

5. Of Theft.

An action lies as well for calling a man a thief, as for charging him with having been guilty of a particular larceny.

Cro. Ja. 114, Minors v. Leeford. {See 5 Bos. & Pul. 335, Penfold v. Westcote.}

After a verdict for the plaintiff, in an action for publishing these words of him, *He is a thief of every thing*, it was said, in order to arrest the judgment, that a person cannot be a thief of every thing, the stealing of trees growing not being a larceny. Judgment was given for the plaintiff; and by the court: it must be intended, that these words import a charge of stealing every thing of which the plaintiff could be a thief; because, as these words include every thing which can be stolen, they must intend a stealing of that which it is felony to steal.

Stra. 142, Morgan v. Williams; ||and see 2 New R. 335.||

As the taking and carrying away of a thing annexed to the reality is not a larceny, an action does not in the general lie for publishing words, which charge the stealing of such thing.

3 Inst. 109.

Agreeably hereto it has been determined, that it is not actionable to publish these words of J S, *He stole the shutters of my windows*; but if the words had been, *He stole the shutters off my windows*, an action would have lain.

Sid. 104, Hall v. Hammond.

According to some old cases no action did lie for publishing words which import the charge of stealing trees growing, or of lead fixed to a house; because these offences are only trespasses.

Cro. Ja. 39, Kellam v. Manesby; Hob. 331; Cro. Ja. 114, 674; 3 Inst. 109.

And although it be at this day actionable to charge a man with having been guilty of cutting down trees, or of stealing lead fixed to a house, this, which is occasioned by statutes made for punishing those offences, since those cases were determined, by no means impeacheth their authority; the principle on which they are founded being still law.

||Sed vide Baker v. Pierce, Ld. Raym. 959, where the words, "J B stole my box-wood," were held actionable, for they must be intended to mean wood cut down.||

¶No action lies for saying that the plaintiff "stole a dog," because a dog is not a subject of larceny.

Findlay v. Bear, 8 S. & R. 571. But property may be had in a dog. See Bouv. L. D., Dog.

(B) What Words are in themselves actionable.

It has been holden, that no action lies for publishing these words, *I charge J S with felony for taking money out of my pocket*; because the words do not necessarily imply a felonious taking.

Hutt. 38, *Mason v. Thompson*. ¶Qu. whether, after verdict, it would not be intended that the jury were satisfied a felonious taking was meant? See 2 New R. 335, and 1 Stark. on Slander, 67, (2d ed.)

And in another case it has been holden, that no action lies for publishing these words of J S, *He is a pickpocket; he picked my pocket of my money*; for, as it does not appear that the taking was felonious, this might be only a trespass.

2 Lev. 51, *Walls v. Rymes*, 1 Ventr. 213.

But in another case it is laid down, that an action does lie for publishing these words, *I charge J S with felony in taking my money out of my pocket*; because it shall be intended that the taking was felonious, and the case of *Mason v. Thompson*, upon the authority of which the case of *Walls v. Rymes* was probably determined, is in this case denied to be law.

Ld. Raym. 959, *Baker v. Pierce*.

An action lies for any words which amount to the charge of petty larceny; for, besides that the party guilty of this offence incurs a forfeiture of all his goods, he is liable to suffer the punishment of whipping, or to be transported.

1. Roll. Abr. 43, *Carter v. Hunt*; 3 Inst. 109.

¶Where the word “thief,” spoken of any individual, is coupled with other words which clearly explain it not to have imported an imputation of felony or criminal fraud, it is not actionable; thus the defendant said, “Thompson is a damned thief, and I can prove it:” but it appearing that he added, “Thompson received the earnings of the ship, and ought to have paid the wages,” and the words were spoken to a person applying to defendant for wages, as master of the ship, Lord Ellenborough directed a nonsuit.

Thompson v. Bernard, 1 Camp. 47.

And where the word “thief” is coupled with such other words, as may or may not, under the circumstances in which they were used, impute a felony, there it seems to be a proper question for the jury to decide, whether they impute a charge of felony, or refer to conduct of the plaintiff not amounting to felony; as where the defendant said of plaintiff, “He is a thief, and has stolen my beer;” and it appeared that the defendant was a brewer, and that the plaintiff, who had been his servant, had received money on sales of beer, which he had not accounted for. Lord Kenyon left it to the jury to consider whether the defendant’s words meant that the plaintiff had actually *stolen* beer, or merely referred to the money received and unaccounted for; since, if the latter was their meaning, they referred to a mere breach of contract, and explained the word “thief,” so as to make it not actionable; and the jury found for the defendant.

Christie v. Cowell, Peake’s case, 4.

If the word “thief” be spoken without any words to explain its meaning, the court will after verdict intend that the jury were satisfied it imputed theft to the person of whom it was spoken.

Penfold v. Westcote, 2 New R. 335.

(B) What Words are in themselves actionable.

A count in slander, charging that the defendant had imposed upon the plaintiff the crime of felony, is good after verdict.

Blizard v. Kelly, 2 Barn. & C. 283; and see 1 Stark. Ca. 382.¶

¶ It is actionable to say, "I have lost a calf-skin out of my cellar, the day that you and A got the leather, and there was nobody in the cellar but you, A and B, and I do not blame you nor B, but A must have *taken* it;" although there was no colloquium of felony, an innuendo of felony was held good after verdict.

Bornman v. Boyer, 3 Binn. 515.

Defendant said that the plaintiff had stolen a note from him, "in the county of Halifax, in Virginia." The stealing of such note was larceny, at the time, by the laws of Virginia. Held, that these words were actionable.

Shipp v. McCraw, 3 Murph. 463.

To say of another, "he has stolen my bee-tree," refers to the tree and not to the bees or honey; and as the word "tree" without further explanation, *ex vi termini* means a standing tree, the words are not actionable.

Idol v. Jones, 2 Dev. 162.

To say of A B that he received a letter containing money, that he gave himself a false name at the time, and promised to deliver the letter, instead of which he broke open the letter and used the money, is a charge of larceny, for which an action will lie.

Cheadle v. Buell, 6 Ohio, 67.

To say of another, "I will venture any thing he has stolen my book," is actionable.

Nye v. Otis, 8 Mass. 122.

A charge against the plaintiff of taking furtively and appropriating to his own use articles of clothing from a corpse driven ashore from a wreck, is actionable.

Wonson v. Sayward, 13 Pick. 402.

The words, "you will steal," are actionable, when it is averred in the declaration that the defendant by the speaking of the words meant, and intended to have it understood and believed, that the plaintiff had been guilty of larceny.

Cornelius v. Van Slyck, 21 Wend. 71.

The words, "My watch has been stolen out of M's bar-room, and I have reason to believe that T took it, and that her mother concealed it," are actionable.

Miller v. Miller, 8 Johns. 74, 77.

"You robbed me, for I found the thing you have done it with," on demurrer, held actionable, *per se*.

Rowcliffe v. Edmonds, 7 Mees. & W. 12.

It is actionable to charge a man with having stolen in another state.

Shipp v. McCraw, 3 Murph. 463.¶

6. Of another crime.

It is actionable to publish these words of J S, *He did burn a barn with corn in it, or a barn that was parcel of a mansion-house*; the burning of such barn being a felony.

4 Rep. 20, Barham's case.

(B) What Words are in themselves actionable.

An action lies for publishing these words of J N, *He harboured his son, knowing him to be a Romish priest*; the doing of this being a felony.(a)

Cro. Ja. 300, Smith v. Flint. ¶ (a) But this severe law is repealed by 18 G. 3, c. 60, and 31 G. 3, c. 32, in favour of all Catholics taking the oaths, &c., required by those acts respectively.¶

No action lies for publishing these words of a person, except he be in an office, *He is a papist*; but it does for publishing these words, *He goes to mass*; for this renders him liable to suffer corporal punishment.(b)

2 Ventr. 265, Walden v. Mitchell. ¶ (b) See note (a) above.¶

Heretofore no action lay for publishing these words, *He received stolen goods, knowing them to be stolen*; because a receiver of such goods was not an accessory, unless he had aided or comforted the thief.

1 Roll. Abr. 68, Dawes v. Boughton; Cro. Eliz. 880.

But there can be no doubt of such words being at this day actionable; for receivers of stolen goods, knowing them to be stolen, are by one statute declared to be accessories after the fact, and by another are liable to be transported for fourteen years.

3 W. & M. c. 9; 4 G. 1 c. 11. ¶ See 7 & 8 G. 4, c. 29, § 54.¶

The books abound with cases of actions for words, which charge the having been guilty of such acts of conjuration, witchcraft, and dealing with evil or wicked spirits, as were within the meaning of the 1 Jac. 1, c. 11.

These offences being put an end to by the repeal of that statute, such actions would consequently have been at an end; but, to remove all doubt, it is expressly provided by the repealing statute, that no suit shall be commenced against a person for charging another with any of these offences.

9 G. 2, c. 5.

It is laid down, that an action lies for publishing these words of a woman, *She has had a bastard*.

4 Rep. 17, Ann Davie's case.

But this case has been denied to be law; and it has been holden, that no action lies for publishing these words, except it be averred that the bastard has been chargeable to a parish; for, unless it have been so, the mother of a bastard is not liable to imprisonment under 18 Eliz. c. 3.

Salk. 694, 696; 1 Roll. Abr. 38.

No action lies for publishing these words of J S, *He is the reputed father of a bastard*, except it be averred, that the bastard has been chargeable to a parish: for, unless it have been so, the reputed father of a bastard is not liable to punishment under the 18 Eliz. c. 3.

Cro. Car. 436, Salter v. Brown; 1 Roll. Abr. 37.

An action does not in the general lie for calling a woman *whore*, this being only a spiritual defamation: but it lies in London, whores being by the custom of that city liable to be carted.(c)

1 Roll. Abr. 36, Hassell v. Cooper; Comb. 138. β In Pennsylvania, to call a woman a whore is actionable, because the crime of fornication is punishable by indictment, and involves a moral turpitude. Andres v. Koppenheaffer, 3 Serg. & Rawle, 260.γ [(c) It seems that this custom has never been proved, so as to maintain an action in Westminster Hall: in the city court the action is maintained, because they take notice of their own customs without proof. Dougl. 380; 4 Burr. 2032.] {And in New York it is held that words charging fornication or adultery are not actionable, without alleging special damage. 2 Johns. Rep. 115, Buys & wife v. Gillespie; 5 Johns. Rep. 188, Brooker v. Coffin. Aliter in Pennsylvania. 2 Binn. 34, Brown v. Lamberton.}

(B) What Words are in themselves actionable.

It has been holden, that no word tantamount to the word *whore* is within the custom of the city of London; and consequently, that no action lies except the word *whore* be made use of.

Lutw. 1042, Houblon v. Miller.

But this case is not now law; it having been since holden, that an action lies in London for calling a woman *strumpet*.

Stra. 555, Cook v. Wingfield. β To charge an unmarried woman with having committed fornication is actionable. Miller v. Parish, 8 Pick. 384. γ

It hath been holden likewise, that in London it is actionable to call a woman's husband *cuckold*; for that, as this is tantamount to the calling of her *whore*, it is within the custom of that city.

Stra. 471, Vicars v. Worth; Ibid. 545. β But in Pennsylvania, it was holden that a mother could not maintain an action of slander for calling her daughter a bastard, there being no colloquium of the mother. Maxwell v. Allison, 11 S. & R. 343. γ

β Words charging a woman with violation of chastity, are actionable in themselves.

Frisbie v. Fowler, 2 Conn. 707. γ

It is not actionable to call a woman a *banod*; this being only a spiritual defamation.

Cro. Car. 229, Hollingshead's case. Ibid. 261.

But it is actionable to charge any person with keeping a bawdy-house; because keeping a bawdy-house is an offence punishable at the common law.

1 Roll. Abr. 44, Turnam v. Thorn; Cro. Car. 229, 261.

An action lies for publishing these words of a brewer, *His beer is unwholesome*; for a brewer that sells unwholesome beer is punishable; and it shall be intended to mean the beer which he sells.

1 Roll. Abr. 62; Lee v. Stradwick.

It is actionable to charge a person with having been guilty of a crime, of which he has upon a trial been acquitted.

Owen, 150, Cuddington v. Wilkins.

An action lies for charging a man with having been guilty of a crime of which he has been convicted and afterwards pardoned; for the pardon takes away the guilt as well as the punishment.

Hob. 81, Cuddington v. Wilkins.

It has been holden, that no action lies for publishing these words of J S, *He is a regrator*; because the offence of regrating does not render a person liable to the loss of life or limb.

2 Show. 32, Scoble v. Lee. \parallel This reason is unsound: Regrating still appears to remain an offence at common law; but the statutes against it are repealed by 12 G. 3, c. 71. See 1 Hawk. P. C. 648, (8th ed.) \parallel

It has likewise been holden, that an action does not lie for publishing these words of J S, *He has stolen my Lord Shaftesbury's deer*; [for though imprisonment be the punishment for this offence, yet *per* Holt, C. J., it is not a scandalous punishment. A man may be fined and imprisoned in trespass. There must not only be imprisonment, but an infamous punishment.]

Salk. 696, Turner v. Ogden; Hil. 3 Ann. [I think, says my Lord C. J. De Grey, Holt in this case carries it too far, as to precision; for it is laid down in Finch's Law, 185, if a man maliciously utters any false slander to the endangering one in law, as to say, *He hath reported that money is fallen*; for he shall be punished for such a report, if it

(B) What Words are in themselves actionable.

be false. Here is the case of a crime, and the punishment not infamous; and yet Finch seems to say an action lies for these words. 3 Wils. 186.] {Vide 3 Cain. 79, 80; 5 Johns. Rep. 188; 1 Binn. 542.} ¶And the words in the text would clearly be actionable at this day, since the offence is now made a felony by statute. Vide 4 Hawk. 190 (8th ed.); 2 Russ. on Cri. 187, and 7 & 8 Geo. 4, c. 29, § 26; and it is now established, that if the words impute a charge which may subject the party to an indictment for any felony or misdemeanor, they are actionable. 3 Bos. & Pul. 374; 6 Term R. 694.¶

The first of these cases is not law, or at least not in the latitude there laid down; for by the 5 Ed. 6, c. 14, (a) a regrator is liable to be set in the pillory for the third offence; and it is contrary to the tenor of many cases of equally good authority with this, to say, that only words importing the charge of a crime which may be punished with the loss of life or limb are actionable.

¶(a) This is repealed by 12 Geo. 3, c. 71, but it seems an offence at common law.¶

And the latter case does not seem to be law; for by a statute many years antecedent thereto it is ordained, that a person guilty of stealing deer shall, in default of paying the penalty of 30*l.*, be set in the pillory.

3 W. & M. c. 10. ¶Vide *suprà*, note.¶

But taking the punishment for stealing deer to have been, at the time this case was determined, only imprisonment, the case does not appear to be law; inasmuch as it does not coincide with the principle on which actions for words in themselves actionable are founded; which is, that words, which imply a damage, are in themselves actionable; and, surely, to charge a person with having been guilty of an offence for which he may be imprisoned, does imply a damage for which he ought have satisfaction.

¶See 3 Bos. & Pul. 374; 6 Term R. 694.¶

The doctrine of this case is moreover contrary to what is laid down in the three following cases, and in many others which might be mentioned.

In one of these it is laid down, that an action lies for any words which import the charge of a crime for which the person charged may be indicted.

Freem. 46, *Mayne v. Diggle*.

In another it is laid down, that an action lies for charging a woman with being the mother of a bastard, in case the bastard has been chargeable to a parish; because she is liable to suffer imprisonment under the 18 Eliz. c. 3.

Salk. 694, 696; 1 Roll. Abr. 33.

In the other it is laid down, that an action lies for any words, by reason of which the person of whom they are published may be imprisoned.

2 Ventr. 266, *Walden v. Mitchell*.

No action lies for publishing these words of J S, *He is a rogue*, (b) *a villain*, or *a varlet*; for these, and words of the like kind, are to be considered as words of heat.

4 Rep. 15, *Stanhope v. Blith*; Stra. 304. ¶(b) In 2 Wils. R. 87, Willes, C. J., said, if it were now *res integra*, he should hold that calling a man a rogue, or a woman a whore, in public company, was actionable.¶

But an action lies for publishing these words of J S, *He is a rogue of record*; for a person cannot be a rogue of record unless he stand convicted upon record.

1 Roll. Abr. 43, *Allesly v. Mawdit*. β See *Idol v. Jones*, 2 Dev. 162.γ

(B) What Words are in themselves actionable.

§ To say to another "*you are a vagrant*," is actionable, under the act of Pennsylvania of 21st of February, 1767, which subjects the offender, on conviction, to imprisonment at hard labour.

Miles v. Oldfield, 4 Yeates, 423.

No action lies for publishing these words of J S, *He is a cozening knave*.

Cro. Ja. 427, Brunkard v. Segar.

So, none lies for publishing these words, *He is a scurvy fellow*.

1 Roll. Abr. 43, Fisher v. Atkinson.

|| So also, no action lies for saying, "You are a swindler;" for when a man is said to be swindled, it only means tricked or outwitted.

Savile v. Jardine, 2 H. Black. 531; *sed vide* 3 Camp. 461.

But to say of one who carries on the business of a corn vender, "You are a rogue and a swindling rascal: you delivered me 100 bushels of oats worse by 6d. a bushel than I bargained for," is actionable, without proof of special damage.

Thomas v. Jackson, 3 Bing. 104.

No action lies for saying of a merchant, "He has brought a forged bill of lading for half the cargo already," (meaning the lading of a particular ship;) for these words do not necessarily impute to the plaintiff a knowledge of the forgery, without which his act was not criminal.

Feiso v. Linder, 3 Bos. & Pul. 372.

§ An action lies for saying of the plaintiff that "he moved the line and made a new line," if these words be laid to have been spoken of and concerning certain boundary trees, and allowed landmarks, forming the evidence of the boundary line between the plantations of the plaintiff and the defendant.

Todd v. Rough, 10 Serg. & R. 18.

To charge a person with voting twice on the same ballot for the election of state officers, is actionable.

Walker v. Winn, 8 Mass. 248.

It is not actionable to charge a person with being a swindler.

Stevenson v. Hayden, 2 Mass. 406.

It is actionable to charge another with a crime, although he could not have legally committed, unless the explanation accompanies the charge; as, to accuse a tenant in common of stealing a chattel held in common.

Carter v. Andrews, 16 Pick. 1. See Stone v. Clark, 21 Pick. 51; Deford v. Miller, 3 Penn. 103. See Dexter v. Taber, 12 Johns. 239.

To say of a person who was a witness, he handed papers to a juror to influence the jury, or to influence or bribe the jury, is slanderous. It amounts to a charge of embracery.

Gibbs v. Dewey, 5 Cowen, 503.

When the charge, if true, will subject the party charged to an indictment for a crime, involving moral turpitude, or subject to an infamous punishment, the words are actionable.

Brooker v. Coffin, 5 Johns. 188.

To charge a plaintiff with having kept a bawdy-house is actionable in itself.

Martin v. Stilwell, 13 Johns. 275.

(B) What Words are in themselves actionable.

Where the words spoken amounted to an assertion that the plaintiff had been lately locked up in a sponging-house, and the jury found they were spoken of him in the way of his trade, held actionable. And, *semble*, if the jury had not so found, they must necessarily be considered as affecting his credit.

Jones v. Littler, 7 Mees. & W. 423.*g*

2. Words which import the Charge of having a contagious Distemper.

Man being formed for society, and standing in almost constant need of the advice, comfort, and assistance of his fellow-creatures, it is highly reasonable that any words, which import the charge of having a contagious distemper, should be in themselves actionable; because all prudent persons will avoid the company of a person having such distemper.

It makes no difference, whether the distemper be owing to the visitation of God, to accident, or to the indiscretion of the party therewith afflicted; for, in every one of the cases, the being avoided, from whence the damage arises, is the consequence.

An action lies for publishing these words of J S, *He is a leper*.

Cro. Ja. 144, Taylor v. Perkins; 1 Roll. Abr. 44.

So, for publishing these words, *He has the great pox*.

1 Roll. Abr. 43, Milner v. Reeve.

So, for calling a woman, *Pockey whore*.

12 Mod. 248, Whitfield v. Powell.

[But charging another with *having had* a contagious disorder is not actionable; for, unless the words impute a continuance of the disorder at the time of speaking them, the gist of the action fails; for such a charge cannot produce the effect which makes it the subject of an action, namely, exclusion from society. To make such words actionable some special damage must be alleged in consequence of them.

Carslake v. Mapledoram, 2 Term R. 473; Taylor v. Hall, 2 Stra. 1389.]

3. Words which are disgraceful to a Person in an Office.

As any words published of a person, who is in the enjoyment of an office of honour, profit, or trust, which import a charge of unfitness to discharge the duty of the office, must be prejudicial to that person; such words are in themselves actionable.

If a person be in an office of profit, words which import a charge of inability are as well actionable as those which imply a want of integrity. But if the office be an office of honour no action lies, unless the import of the words be a charge of want of integrity; for, although a person cannot help his want of ability, he may his want of integrity.

Salk. 695, How v. Prynne; Ibid. 698; 1 Roll. Abr. 65.

Wherever words in themselves not actionable become so by being published of a person in an office, it must appear from the words themselves, or from the pleadings, that they were published concerning him as an officer; for the ground of such words being actionable, is the prejudice to a person in his office.

Cro. Ja. 557, Fleetwood v. Curl; Hetl. 167; 1 Lev. 280; Ld. Raym. 1360; 1 Stra. 618; 2 Stra. 1168.

(B) What Words are in themselves actionable.

1. To a person in a judicial Office.

An action lies for publishing these words of a Lord Chief Baron, *My Lord Chief Baron cannot hear of one ear.*

Hetl. 167, Alleston v. Moor.

An action lies for publishing these words of a justice of the peace, *He is a common barrator.*

Hob. 140; Thornton v. Jobson, 1 Roll. Abr. 59.

So, for publishing these words, *He is a corrupt man.*

1 Roll. Abr. 57, Bishop of Coventry v. Wortly.

So, for publishing these words, *He is a forsworn justice.*

1 Lev. 280, Carne v. Osgood.

So, for publishing these words, *He is a false justice.*

Cro. Eliz. 358, Wright v. Moorhouse.

So, for publishing these words, *He is but a half-eared justice, he will hear but one side.*

Cro. Car. 223, Masham v. Bridge.

So, for publishing these words, *I have often been with him for justice, but never could get any at his hand but injustice.*

Cro. Car. 14, Isham v. York.

So, for publishing these words, *He did for malice and spleen many times wrest the law, and pervert justice to serve his own turn.*

Cro. Ja. 240, Beaumont v. Hastings.

So, for publishing these words, *He is a debauched man, and not fit to be a justice of peace.*

1 Roll. Abr. 48, Hammond v. Kingsmill.

So, for publishing these words, *He covereth and hideth felonies, and is not worthy to be a justice of peace.*

4 Rep. 16, Stuckley v. Bulhead.

So, for publishing these words, *He is a rogue, a rascal, a villain, and a liar.*

8 Mod. 270, Aston v. Blagrove, Ld. Raym, 1369. β When words spoken of a magistrate have no relation to his official character, they are not actionable; as "Squire Oakley is a damned rogue." Oakley v. Farrington, 1 Johns. Cas. 129. γ

But no action lies for publishing these words of a justice of peace, *He is an ass, and a beetle-headed justice*; because these words import only want of ability.

Salk. 695, How v. Prynne. [See 3 Wils. 186.]

No action lies for publishing these words of a justice of peace, *He is a bloodsucker*; for it cannot be intended what blood he sucked.

Cro. Eliz. 306, Hilliard v. Constable.

If the actionable words published of a justice of peace, appear to have been published concerning his office of a justice of the peace, it is not necessary to allege, that at the time of publishing the words there was a *colloquium* concerning his office.

1 Lev. 280, Carne v. Osgood. β Words spoken of a judge imputing official misconduct are actionable, without colloquium or innuendo. Hook v. Hackney, 16 Serg. and Rawle, 385. γ

(B) What Words are in themselves actionable.

Wherever words, for publishing of which an action would lie, are spoken to a justice of peace, when he is in the execution of the office of justice of the peace, the speaker may be proceeded against by indictment or information.

Stra. 420, 1158; Comb. 46, 65, 66.

In an action brought by J S, who had pronounced a sentence as judge of a court of admiralty, for publishing these words, *The said sentence was given corruptly*, it was holden, that the action lay; although it was not averred, that the sentence was given corruptly by J S; and by the court—It must be intended, that the words were published of J S, who gave the sentence.

Cro. Eliz. 305, Cæsar v. Curseny.

¶ To charge a sheriff with malpractice in his office, is actionable.

Dole v. Van Renselaer, 1 Johns. Ca. 330. g

2. To a person in an Office of Trust.

An action lies for publishing these words of a person in a public office, *He is a common barrator*.

Hob. 140, Thornton v. Jobson, 1 Roll. Abr. 59.

So, for publishing these words of a commissioner for examining witnesses in a cause in the Court of Chancery, *He is a corrupt man*.

Cro. Ja. 65, Moor v. Foster.

So, for publishing these words of such commissioner, *He hath taken bribes to favour one of the parties*.

1 Roll. Abr. 56, Moor v. Foster.

So, for publishing these words of such commissioner, *He hath altered the depositions that were taken*.

1 Roll. Abr. 57, Parker v. Large.

If these words are published of a churchwarden, *He hath cheated the parish*, an action lies; for the words import a misbehaviour in an office of trust.

1 Roll. Abr. 58, Strode v. Holmes; Cro. Eliz. 358.

If these words are published of the steward of a court, *He hath wronged me in his court, and hath not performed his office according to law*, an action lies; a charge of great misbehaviour in an office of trust being thereby imported.

1 Roll. Abr. 56, Fowell v. Cowe.

If these words are published of a bailiff, or of any servant who is to account for money received, *He is a cozening knave to the person who employs and confides in him*, an action lies; for the words amount to a slander in an office of trust.

Cro. Car. 480, Seaman v. Bigge.

[But these words spoken of a member of parliament, *As to instructing our members to obtain redress, I am totally against that plan; for, as to instructing Mr. Onslow, we might as well instruct the winds; and should he even promise his assistance, I should not expect him to give it us*—were holden not to be actionable.

Onslow v. Home, 3 Wils. 177; 2 Bl. Rep. 753, S. C.]

{ Words spoken of a sheriff, in relation to his office, amounting to a charge of malpractice, are actionable: as if it be said, *Moneys which he*

(B) What Words are in themselves actionable.

collected on execution he has taken and converted to his own use, and they could not be got out of his hands.

1 Johns. Ca. 330, Dole v. Van Rensselaer.}

4. *Words which are disgraceful to a Person of a Profession or Trade, & or which affect his Character or Standing.*

Words in themselves not actionable become so, whenever any person is thereby disgraced in his profession or trade; for although it may be difficult to prove the special damage received from them, nothing is more clear than that such words have a direct and certain tendency to injure the person of whom they are published.

β Sumner v. Utley, 7 Conn. 257; Demarest v. Herring, 6 Cowen, 76.γ

But in all actions for words of this kind, it must appear from the words themselves, or from the pleadings, that at the time of publishing the words there was a *colloquium* concerning the profession or trade of the person of whom they were published.

2 Saund. 307; Stra. 696, 1169; Cro. Ja. 557; Salk. 694.

β In slander for words concerning the plaintiff in the way of his trade, a staymaker, which in their ordinary sense, amounted only to a general imputation on his moral conduct, and the jury having negatived the imputation that they amounted to a keeping a house for which he would be indictable; held not actionable.

Brayne v. Cooper, 5 Mees. & W. 249.γ

1. To a Clergyman.

An action lies for publishing these words of a clergyman, *He is a drunkard*; drunkenness being an offence for which a clergyman is liable to be deprived of his preferment.

All. 63, Dodd v. Robinson; β McMillan v. Birch, 1 Binn. 178; Chaddocks v. Briggs, 13 Mass. 248.γ

So, for publishing these words, *He preacheth nothing but lies and malice in the pulpit.*

3 Lev. 17, Cranden v. Walden; 1 Roll. Abr. 58.

So, for publishing these words, *He is a rogue and a dog, and will never be good till he is three feet under ground; I had rather my son should make hay on a Sunday than go to hear him preach.*

Comb. 253, Pocock v. Nash.

So, for publishing these words, *He is an old rogue, and a contemptible fellow, and hated and despised by everybody.*

Stra. 946, Musgrave v. Bovey.

β To charge a clergyman with incontinency, is actionable.

Demarest v. Herring, 6 Cowen, 76.γ

2. To a Physician or a Surgeon.

If a barrister bring an action for the publication of words, which are disgraceful to him in his profession, it must be averred that, at the time of publishing the words, he was a practising lawyer; for, unless he were at that time a practising lawyer, he could not be injured by the words.

2 Ventr. 28, King v. Lake. [Qu. Whether any action will properly lie for words spoken of physicians and barristers, their fees being merely honorary, and not demandable in a court of law.] ¶ There seems little ground for this query: actions by physicians are not unfrequently brought, and were formerly brought by barristers, and the

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objection never appears to have been taken. See 8 Term R. 303; 1 New R. 208; 3 Wils. 59; and though barristers and physicians cannot sue for their fees, yet in practice they are usually paid beforehand; and the courts could hardly refuse to consider these as *profitable* employments, in respect of which a party may be injured by slanderous words.¶

There has been, perhaps, no determination upon the point; but it seems equally necessary, that if a physician bring an action for the publication of words, which are disgraceful to him in his profession, he should aver that, at the time of publishing the words, he was a practising physician.

¶ There can be no doubt that, where the words only apply to the plaintiff's professional character, it is necessary for him to aver and prove that he was a *practising physician* at the time of the uttering.

And if the words themselves deny the plaintiff's legal qualification to practise, (as his having a regular diploma in the case of a physician,) it will be necessary for the plaintiff to prove his legal qualification as well as his practising; and it seems doubtful whether this proof is not necessary in all cases, except where the slanderous words admit and recognise the plaintiff's professional qualification. In this case the proof of such qualification is unnecessary.

Moises v. Thornton, 8 Term R. 303; Pickford v. Gutch, Ibid. 305, n.; Smith v. Taylor, 1 New R. 196; Berryman v. Wise, 4 Term R. 366.

If the plaintiff aver in his declaration, that he has duly taken the degree of doctor of physic, the allegation must be strictly proved.

Moises v. Thornton, *ubi supra*; where see as to the evidence requisite.¶

β No action will lie for saying of a physician, *He cannot get business any more; he is so drunk he cannot do business any more; the people will not employ him.*

Anon, 1 Ohio, 83, n.¶

An action lies for publishing these words of a doctor of physic, *He is no scholar*, without averring that, at the time of publishing the words, there was a *colloquium* concerning his profession; because no man can be a good physician unless he be a scholar.

1 Roll. Abr. 54; Cawdry v. Chickly, Cro. Car. 270.

So, for publishing these words, *He is an empiric and mountebank.*

1 Roll. Abr. 54, Goddard v. Haselfoot.

So, for publishing these words, *He is a quacksalver.*

1 Roll. Abr. 54, Allen v. Eaton.

It has been holden, that no action lies for publishing these words of a physician, *He hath killed a patient with physic*, unless it be added, that he did it knowingly and willingly; for, as a physician may mistake a case, and undesignedly give improper medicines, these words are no disgrace to him in his profession.

Cro. Eliz. 620, Poe v. Mounford, M. 40 Eliz.

This determination was contrary to the opinion of Clinch, J., and the reason upon which it is founded is not apparent. It is certainly a disgrace to a physician in his profession, to have it believed that a patient died by taking improper medicines prescribed by him; and, by comparing this case with some later cases, it seems clear that words which imply ignorance in the art a person professes are actionable.

It is laid down in one case, that an action lies as well for publishing

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words which import a want of knowledge in a person of a profession, as for words which import a want of fidelity.

Win. 40, Auditor Curl's case, M. 20 Jac. [For imputation of ignorance to one in a profession, I think an action will certainly lie. Per De Grey, C. J., 3 Wils. 186.]

In another case it is laid down, that an action lies for publishing these words of a surgeon who had J S under his care, *He killed J S*, although it be not averred that he did it knowingly or voluntarily.

Hetl. 69, Watson v. Vanderlash, Mich. 3 Car.

And in another case it is laid down, that an action lies for publishing these words of an apothecary, *He killed a patient with his physic*.

11 Mod. 221, Tutler v. Alwin, Pasch. and Ann. β See Sumner v. Utley, 7 Conn. 257.γ

No action lies for publishing these words of a surgeon, *He poisoned the wound of J S*, for it might be proper in order to cure the wound to do this.

Hetl. 175, Suegoe's case.

But if these words are published of a surgeon, *He poisoned the wound of his patient for gain of money*, an action lies.

1 And. 268; Ca. 277.

β It is not actionable to say of a physician that he is a two-penny bleeder.

Foster v. Small, 3 Whart. 138.γ

3. To a Barrister or an Attorney at Law.

If a barrister bring an action for the publication of words, which are a disgrace to him in his profession, he must aver, that at the time of publishing the words he was a practising lawyer; for if he were not at that time a practising lawyer, he could not be injured by the words.

2 Ventr. 28; King v. Lake, Styles, 231.

A barrister, who brings such action, must also aver that at the time of publishing the words he was *homo conciliarius et eruditus in lege*; it not being sufficient to aver that he was *homo eruditus in lege*.

Poph. 207, Cary's case.

An action lies for publishing these words of a barrister, *He has deceived his client, and revealed the secrets of his cause*.

Co. Entr. 22; Snag v. Gray, 1 Roll. Abr. 57.

So, for publishing these words, *He will give you vexatious counsel, and then milk your purse and fill his own pocket*.

2 Ventr. 28, King v. Lake.

So, for publishing these words, *He is no lawyer, he cannot make a lease; they are fools that go to him for law*.

1 Roll. Abr. 54, Banks v. Allen.

So, for publishing these words, *He is a dunce, and will get nothing by his profession*.

Cro. Car. 382; Peard v. Johns, 1 Roll. Abr. 55. β To say of an attorney in a particular suit, "F knows nothing about the suit, he will lead you on till he has undone you," is not actionable, without alleging and proving special damages. Foot v. Brown, 8 Johns. 64.γ

An action lies for publishing these words of an attorney at law, *He cannot read a declaration*.

1 Lev. 297, Powell v. Jones.

(B) What Words are in themselves actionable.

So, for publishing these words, *He has no more law than Mr. C's bull, or no more law than a goose.*

Sid. 327, Baker v. Morfue.

[So, for these words, *What, does he pretend to be a lawyer? He is no more a lawyer than the devil.*

Day v. Buller, 3 Wils. 59.]

So, for publishing these words, *He will overthrow his client's cause.*

Cro. Eliz. 589, Martyn v. Burling.

So, for publishing these words, *He is well known to be a corrupt man, and to deal corruptly.*

4 Rep. 16, Byrchley's case.

So, for publishing these words, *He is a cheat.*

Hetl. 167, Allston v. Moor; 1 Roll. Abr. 53.

So, for publishing these words, *He is a rogue.*

1 Roll. Abr. 52, Shaw v. Wakeman.

So, for publishing these words, *He is a common barrator.*

Cro. Eliz. 171, Proud v. Hawes; Hob. 140.

So, for publishing these words, *He is a knave.*

1 Roll. Abr. 52, Nicholls v. Webb; 1 Freem. 277.

So, for publishing these words, *He is an extortioner, and one told me he cozened him of ten pounds in a bill of costs*; it being contrary to the oath of an attorney to be guilty of malpractice.

1 Roll. Abr. 55, Stanley v. Boswell.

So, for publishing these words, *He stirreth up suits, and once promised me, that if he did not recover in a cause for me, he would take no charges of me*; because stirring up suits is barratry, and undertaking a suit no purchase no pay is maintenance.

1 Roll. Abr. 54; Smith v. Andrews, Hob. 117.

So, for publishing these words, *He is a rogue for taking your money, and has done nothing for it; he is no attorney at law, and dares not appear before a judge; what signifies going to him, he is only an attorney's clerk and a rogue, he is no attorney.*

Stra. 1138, Hardwick v. Chandler.

So, for publishing these words, *He is a common maintainer of suits, and a champertor, (a) and I will have him thrown over the bar next term.*

Hob. 117, Boxe v. Barnaby; 1 Roll. Abr. 55. ||(a) The judgment was founded only on the word "champertor."||

{It is not actionable to say of an attorney, *I have taken out a summons to tax his bill. I shall bring him to book and have him struck off the roll. Aliter, to say, He deserves to be struck off the roll.*

2 Esp. Rep. 624, Phillips v. Jansen.}

It has been holden, that an action does not lie for publishing these words of an attorney, *He made false writings*; because these words, it not being the business of an attorney at law to make writings, are no disgrace to him in his profession.

Win. 40, Auditor Curl's case; Ibid. 90.

But it is probable, that an action would at this day lie, for publishing

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such words of an attorney ; for, although it may not have been so heretofore, it is at this day usual for attorneys at law to make writings.

The jury found words spoken of an attorney, *He has defrauded his creditors and been horse-whipped off the course at D*, not to have been spoken of him in his character as an attorney, held, not actionable.

Doyley v. Roberts, 3 Bing. N. S. 835.

4. To a Person professing an Art.

An action lies for publishing these words of a midwife, *Many have perished for her want of skill*.

Cro. Car. 211, Hower's case.

A said to B, who intended to send his son to be under the care of C, a schoolmaster, *Put not your son to him, for he will come away as great a dunce as he went*. It was holden, that the words were actionable.

Hetl. 71, Watson v. Vanderlash.

If these words are published of a land surveyor, *He is a cheating knave*, an action lies ; for, as land-surveying is an art wherein skill is required, these words touch a land-surveyor in his profession and means of getting his living.

Cro. Ja. 504, Blunden v. Eustace.

5. To a Tradesman.

It is in the general true, that an action does not lie for publishing words, not in themselves actionable, of a tradesman ; unless it be averred that at the time of publishing the words there was a *colloquium* concerning his trade.

Salk. 694, Savage v. Robery ; 2 Saund. 307 ; Latch. 114 ; 1 Lev. 115, 250 ; 2 Lev. 62 ; Stra. 696, 1169 ; Ld. Raym. 1417 ; {3 Cain. 329, Gilbert v. Field.}

But, if it appear from the words published of a tradesman, that they were published concerning his trade, it is not necessary to aver, that at the time of publishing them there was a *colloquium* concerning his trade.

1 Lev. 115, 250 ; 2 Lev. 62 ; 5 Mod. 398 ; Stra. 696 ; Ld. Raym. 1417 ; {1 Wash. 150, Hoyle v. Young.}

If these words are published of a tradesman, *Have a care of him, do not deal with him, he is a cheat, he has cheated all the farmers at E, and now he is come to cheat at F*, an action lies, although it be not averred, that at the time of publishing them there was a *colloquium* concerning his trade ; it being apparent, from the words, that they were published concerning his trade.

2 Lev. 62, Reeve v. Holgate.

So, for publishing these words of a tradesman, *He is a sorry pitiful fellow, and a rogue ; he compounded his debts at six shillings in the pound* ; although it be not averred, that, at the time of publishing them, there was a *colloquium* concerning his trade ; for these words, published of a tradesman, must greatly lessen his credit, and be very prejudicial to him.

Ld. Raym. 1480, Stanton v. Smith.

In an action upon the case for publishing a libel, the plaintiff declared, that he was a gunsmith, and that, it having been inserted in the Craftsman, that he had the honour to present the Prince of Wales with a gun two feet six inches long, which would shoot as far as one a foot longer, and to

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kiss his Royal Highness's hand, upon being appointed his gunsmith, the defendant, with intent to scandalize him in his trade, published an advertisement in these words, "Whereas there was an account in the Craftsman of John Harman, gunsmith, making guns two feet six inches long to exceed any made by others of a foot longer, (with whom it is supposed he is in fee,) this is to advise all gentlemen to be cautious, the said gunsmith not daring to engage with any artist in town, nor ever did make such an experiment, (except out of a leather gun,) as any gentleman may be satisfied of at the Cross Guns in Long Acre." It was holden, that an action lay for this advertisement.

Stra. 898, Harman v. Delany; [Fitzg. 121, 253, S. C.; 1 Barnard. B. R. 289, 438, S. C.]

If an action be brought, for publishing words of a tradesman, concerning his trade, it must be averred, that at the time of publishing them he was in trade; for, if he were not at that time in trade, his credit could not be hurt by the words.

Cro. Car. 282, Collis v. Malin.

In an action for publishing words of a tradesman, upon the first day of May, it was averred, that for five years preceding the first day of May, the plaintiff had exercised the trade of a draper. It was objected, that it ought to have been averred, that he did exercise the trade on the day the words were published: but by the court—It is well enough, for it shall be intended that he did.

Cro. Ja. 222, Tuthill v. Milton.

It was holden, that an action lies for publishing these words of a limeburner, *He is a cheating knave*; and by the court—If slanderous words are published concerning the trade of a tradesman, it is not material of how low a kind the trade is.

1 Lev. 115, Terry v. Hooper.

An action lies for publishing these words of any person who seeks his living by buying and selling, *He is a bankrupt knave, and not worth three halfpence*.

Cro. Ja. 285, Squire v. Johns. β To say of a drover whose business is to buy droves of cattle, drive them to market and sell them, that he is a bankrupt, is actionable, without special damages. Lewis v. Hawley, 2 Day, 495.γ

An action lies for publishing these words of a shoemaker, *He is a bankrupt*; for, as the gain of a shoemaker does not arise from manual labour only, but great part thereof from buying leather and selling it again, when manufactured into shoes, he may be a bankrupt.

Cro. Car. 31, Crumpe v. Barne. {So of a drover, 2 Day. 495, Lewis v. Hawley.}

||But it matters not whether the tradesman be subject to the bankrupt laws or not; therefore words imputing insolvency to an innkeeper were held actionable, although he was not subject to be a bankrupt.

Whittington v. Gladwin, 5 Barn. & C. 180; and see Sir Thomas Raym. 231.||

If a person bring an action for the publication of these words of him, *He is a bankrupt*, he must aver, that he seeks his living by buying and selling; for it is not sufficient to aver, that he gets divers gains by buying and selling.

Sid. 299, Emerson's case.

An action lies for publishing these words of a tradesman, *He is a sorry*

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pitiful fellow, and a rogue, and compounded his debts at five shillings in the pound.

Ld. Raym. 1480, Stanton v. Smith.

An action lies for publishing these words of a tradesman, *He is a pitiful fellow, and not able to pay his debts.*

Carth. 330, Cook v. Tucker.

So, for publishing these words, *He takes goods of his customers, and pawns them, and is not a man to be trusted.*

1 Roll. Abr. 59, Porte v. Cook.

{So, for saying of a merchant *You keep false books, and I can prove it.*

5 Johns. Rep. 476, Backus v. Richardson.}

So, for publishing these words, *He is not able to pay sixpence in the pound to his creditors of their debts.*

1 Roll. Abr. 60, Smith v. Rookes.

An action lies for publishing these words of a leather-seller, *He hath cozened you: he sold you lamb-skins for shamois-skin: do not go to him, for he will cozen you*, the words being a charge of a fraud in the course of trade.

1 Roll. Abr. 63, Fairbank v. Mason.

An action lies for publishing these words of a goldsmith, *He is a cozening knave, he sold a copper chain for a gold one.*

1 Roll. Abr. 62, Peck's case.

An action lies for publishing these words of a tradesman, *He is a cheating old rogue, and has cheated the fatherless and the widow.*

Ld. Raym. 1417, Ludwell v. Hole.

An action does not lie for publishing these words of J S, *He cozened J N in the sale of barley*, unless it be averred that J S did seek his living by buying and selling barley; for if he did not, he could not be injured by the words.

1 Roll. Abr. 62, Bray v. Haynes.

||To say of one who carries on the business of a corn-vender, "You are a rogue and a swindling rascal; you delivered me one hundred bushels of oats worse by 6d. a bushel than I bargained for," is actionable without any special damage.

Thomas v. Jackson, 3 Bing. 104; *sed vide* Feise v. Linder, 3 Bos. & Pul. 372.¶

If these words are published of a blacksmith, *He cozened J S in a tire of wheels*, an action does not lie; for it might be in the price; and it may be said of every tradesman, who has sold a thing for more than it is worth, that *he cozened in the price of that thing.*

5 Roll. Abr. 15, Ticknell v. Snelling.

An action does not lie for publishing these words of a carpenter, *He has charged J S for forty days' work, and received the money for the work that might have been done in ten days, and he is a rogue for his pains.*

2 Stra. 797, Lancaster v. French.

||It must sufficiently appear on the declaration, that the trade in which the plaintiff complains of being slandered is a lawful trade. Therefore, where the plaintiff stated that he was a jobber or dealer in the funds, and as such had been accustomed lawfully to contract, and that the defendant said of the plaintiff *as such jobber or dealer*, "He is a lame duck," (mean-

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ing that the plaintiff had not fulfilled his contracts in respect of the said stocks or funds,) the declaration was holden bad; since it did not sufficiently appear, either that the words were spoken of lawful contracts, or that the plaintiff was a lawful jobber or dealer; and a man may act as a jobber and dealer in the funds either in a lawful or an unlawful way.

Morris v. Langdale, 2 Bos. & Pul. 284.

If the declaration allege that plaintiff carried on two trades, and that the defendant, intending to injure him in his trades, spoke the words of and concerning him in *one* of his trades, it will be sufficient to prove that the plaintiff carried on that one trade, provided the words proved apply to him in that trade.

Figgins v. Cogswell, 3 Maule & S. 369; and see *Hall v. Smith*, 1 Maule & S. 287.

If defamatory words be spoken of two partners respecting their trade they may maintain a joint action.

Cooke v. Batchellor, 3 Bos. & Pul. 150.¶

¶ It is actionable falsely to say of a blacksmith, in relation to his business, *He keeps false books, and I can prove it.*

Burtch v. Nickerson, 17 Johns. 217. See *Backus v. Richardson*, 5 Johns. 476.

To say falsely of a merchant that a debt will be lost because he is unable to pay it, is actionable.

Mott v. Comstock, 7 Cowen, 654.

On being asked, "were there any failures yesterday?" the defendant answered, "Not that I know of, but I understand that there is trouble with the Messrs. S," who were merchants. Held, that the words being spoken of plaintiffs as merchants, were actionable.

Sewall v. Catlin, 3 Wend. 291.

Any words spoken of a person in relation to his trade or profession, which tend to impair his credit, or charge him with fraud or indirect dealing in his line of business, are actionable.

Davis v. Davis, 1 Nott & M'C. 290.

To say of a merchant, *You have got my money on your shelves, you are a damned rogue*, is actionable.

Davis v. Davis, 1 Nott & M'C. 290.

6. To the Character and Standing of a Person.

In South Carolina, it is actionable falsely to call a man a *mulatto*, persons of colour labouring under many disabilities in that state.

Eden v. Legare, 1 Bay, 171; *King v. Wood*, 1 Nott & M'Cord, 184.8

(C) Some Words which become actionable by reason of the Damage received from them : ¶ And herein of Slander of Title.¶

If J S have received a temporal damage, from the publication of these words of him, *He is a bastard*, an action lies; although the words, being only a spiritual defamation, are not in themselves actionable.

4 Rep. 17, Anne Davis's case.

In an action upon the case the plaintiff declared, that he was heir apparent to his father, who was seised in fee of land of the value of forty pounds a year; that it was the intention of his father to suffer this land to descend upon him; and that the defendant, with an intent to cause the

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disinheritance of the plaintiff, published these words of him, *He is a bastard*; by reason whereof the plaintiff's father had signified a design of disinheriting him. It was holden, that the action lay on account of the temporal damage.

1 Roll. Abr. 38, *Humphries v. Strutfield*.

In an action upon the case the plaintiff declared, that land was settled upon his grandfather and the heirs of his body; that his father left divers sons, of which he is the youngest; that his elder brothers are living; that J S, being about to purchase the land, did offer him a sum of money to join in a conveyance thereof; and that the defendant published these words of him, *He is a bastard*: by reason whereof, J S did now refuse to give him the money, for joining in a conveyance of the land, which he had before offered. Judgment being given for the plaintiff, a writ of error was brought in the Exchequer Chamber; in which it was assigned for error, that, as the plaintiff had not at the time of publishing the words any title to the land, the action does not lie. The judgment was affirmed; and by the court—Although the plaintiff had not at the time of publishing the words any title to the land, he is in possibility inheritable thereto. It does moreover appear that, by reason of the publication of the words, J S does now refuse to give the money to the plaintiff, for joining in a conveyance of the land, which he did before offer; and consequently the plaintiff has sustained a present damage.

Cro. Ja. 213, *Vaughan v. Ellis*.

§ In Pennsylvania, it is actionable to call a woman a whore, without showing any special damages.

Andres v. Kopperheafer, 3 S. & R. 261.

So to call a married woman an adulteress.

Andres v. Kopperheafer, 3 S. & R. 261.

To say of a married man, *You got to bed with A B*, a certain woman; or to say of him, *He is such a whoring fellow, that it is with difficulty he can keep a girl about the house, being continually riding them*, is actionable.

Walton v. Singleton, 7 S. & R. 449.

A charge against a married man that "he played with M P in the fodder room, and that R, the second son of P was belonging" to him, "and that one or two of the other children was his," held to be actionable.

Brown v. Lamberton, 2 Binn. 34.

In an action upon the case the plaintiff declared, that he was seised of the manor of A, which was purchased by him in fee of George Lord Audley; that he was in treaty with J S for a lease of the manor at the rent of a hundred pounds a year; and that the defendant, knowing of the treaty, published these words, *I have a lease of the manor of A for ninety years*, and did moreover publish a lease for ninety years, supposed to be made by the grandfather of George Lord Audley to Edward Dickenson, the defendant's late husband; which he affirmed to be a good lease, and offered to sell as such; whereas the truth is that the lease was counterfeited by her husband, and that she knew the lease to be a counterfeit lease: by reason of which words, and the publication of the lease, J S did not proceed in the treaty for a lease. The defendant by her plea traversed, that she knew the lease to be a counterfeit lease. Upon a demurrer

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to this plea, it was holden, that, as the defendant's knowledge of the lease being a counterfeit lease is not traversable, it must be intended, that she knew the lease to be a counterfeit lease. It was moreover holden, that the action lay; because the treaty with J S for a lease was broken off by the defendant's words, and by her publication of the lease, as a good lease, which she knew to be a counterfeit lease.

4 Rep. 18, *Gerrard v. Mary Dickenson*.

In an action upon the case, the plaintiff declared that he was in treaty with J S for his manor of D, and that during the treaty the defendant spoke these words to J S, *Williams is worth nothing, and do you think the manor of D is his? it is but a compact between his brother Thomas and him*: by reason whereof J S was deterred from proceeding in the intended purchase. A question arising, Whether, as the words were not spoken to J S, the action did lie? It was holden that it did; and by the court—If the title of a person to land be so slandered by words spoken, that he cannot make sale thereof, it is not material whether words were spoken to the party who was about to purchase the land, or to a stranger.

2 Leon. 111, *Williams v. Linford*.

, An action does not lie for the publication of words, whereby the right of a person to land is denied; although the sale of the land be thereby prevented; in case the speaker did, at the time of publishing the words, say, that he had himself a right to the land, notwithstanding the speaker had not in truth any right thereto; for if an action did in such case lie, no person could lay claim to land, or commence a suit for the recovery thereof, without being liable to an action.

4 Rep. 18, *Gerrard v. Mary Dickenson*; ||*Smith v. Spooner*, 3 Taunt. 246; Com. Dig. *Action, Case Defamation, C. 2.*||

But if, during a treaty for the sale of land by J S, words denying the right of J S to the land are published by J N, whereby the sale is prevented, an action lies, notwithstanding J N did, at the time of publishing the words, say, that A B had a right to the land; for, although it were lawful for J N to say, that he had himself a right to the land, it was not lawful for him to say, that A B had a right thereto.

Cro. Ja. 165, *Earl of Northumberland v. Burt*.

||However, if a party attend *bonâ fide* at a sale, as the *agent* and by the directions of another having title or interest in the premises, and assert facts destructive of the plaintiff's title, no action lies against him, even although he go somewhat beyond the instructions of his employer in what he states.

Hargrave v. Le Breton, 4 Burr. R. 2422.

If the person uttering or writing the slander of title be a mere stranger, *qui immiscet se rei alienæ*, malice will generally be inferred against him; but every person is not to be considered a stranger who has not an actual vested interest at the time of denying the plaintiff's title. Thus, where the imputation on the title was the asserted insanity of the vendor from whom the plaintiff purchased, at the time of executing the conveyance, and the defendant was the husband of the sister of such vendor, and his wife was heir at law of her brother, in case of his dying without issue, it was held that the defendant had an interest sufficient to preclude his being considered as a mere stranger to the title; and the question for the jury's consideration was decided to be, not whether the defendant had drawn a

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rational and just conclusion of the vendor's insanity from the facts of his conduct, but whether, under all the circumstances, he acted *bonâ fide*, and was really persuaded he was insane when he made the communication, or whether he had made it maliciously, and merely to slander the title.

Pitt v. Donovan, 1 Maul. & S. 639; and see Humber v. Ainge, Mann. Jud. tit. Libel, pl. 13.

The defendant, in justifying slander of title, must clearly show himself not to be a stranger to the matter. Therefore, where the plaintiff declared for slandering his title to the ore of certain mines, (which he was about to sell,) by the defendant's publishing an advertisement, stating that the adventurers of the mines thought it their duty to caution persons against purchasing the ore, as they would be liable to be called on for the amount by the adventurers, and the defendant, in his justification, did not allege that he published the advertisement by direction of the adventurers, or that he had any title or interest himself, the plea was held bad, as the defendant showed no authority from parties interested.

Rowe v. Roach, 1 Maul. & S. 304.

Where the defendant speaks the words, claiming title to the property in himself, he may give this defence in evidence on the general issue.

Smith v. Spooner, 3 Taunt. 246.||

An action does not lie for publishing these words of a clergyman, *He is an heretic*; the words being only a spiritual defamation: but, if it be averred, that by reason of the words he lost a benefice, to which he would otherwise have been presented, an action lies for the temporal damage.

4 Rep. 17, Anne Davis's case.

An action does not lie for publishing these words of a single woman, *She is a bursten-bellied quean, and her guts hang down to her garters*; the words not being in themselves actionable: but if it be averred, that by reason of the words she lost a marriage, an action lies.

Lit. Rep. 193, Bridge v. Langford.

An action does not lie for publishing words of a single woman, which amount to a charge of incontinence; the words being only a spiritual defamation: but if it be averred, that by reason of the words she lost a marriage, an action lies for temporal damage.(a)

4 Rep. 17, Anne Davis's case. β In Pennsylvania, to call a woman a whore, is actionable. Andres v. Koppenhefer, 3 S. & R. 260.γ [(a) For wherever some certain or probable temporal loss or damage ariseth from the imputation of the want of chastity, it is actionable; as to say, a woman is a whore in London, where she is subject to be whipped for whoredom; or to say that she is so, where she holds an estate *dum sola et casta fuerit*. 1 Lev. 134; 3 Wils. 187.] {Or to charge with incontinence a person employed to preach to a dissenting congregation at a licensed chapel, by reason whereof persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they usually had and otherwise would have given. And it is sufficient to lay the special damage in that manner, without saying who the persons were, or by what authority they excluded him; or that he was a preacher duly qualified according to st. 10 Ann. c. 2; 8 Term, 130, Hartley v. Herring.} ||So, also, the loss of the entertainment and hospitality of her friends, who, by reason of the words, have refused to receive plaintiff at their houses, is sufficient damage to sustain the action. Moore v. Meagher, 1 Taunt. 39.||

An action does not lie for publishing these words of J S, *He is a whore-master, for he lay with Brown's wife, and had to do with her against a chair*; the words being only a spiritual defamation: but if it be averred, that by reason of the words J S lost a marriage, an action lies for the

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temporal damage ; a loss of marriage being as great a damage to a man as it is to a woman.

Cro. Ja. 323, *Matthew v. Cross* ; Latch, 218 ; Cro. Ja. 422.

It was found by a special verdict, that the defendant had preferred a libel in the spiritual court against the plaintiff, in which she charged him with coming often to her in the night under a pretence of being a suitor to her for marriage, and lying with her, and getting her with child ; that she afterwards falsely and injuriously, at the quarter-sessions, charged him with being the father of a child begotten upon her body ; and that by reason thereof all persons of good credit did, and still do, refuse to suffer any woman of their daughters or relations to be joined with him in lawful wedlock. It was holden, that, as it was not found that the plaintiff had lost a *particular marriage*, the action did not lie ; the charge, that all persons of good credit refused to let him marry into their families being too general.

1 Roll. Abr. 36, *Norman v. Symons*.

In an action for publishing these words of a single woman, *She was with child by J S*, it was averred that by reason thereof she incurred the displeasure of her parents, and was in danger of being turned out of doors. It was holden, that the action did not lie, inasmuch as the words are not in themselves actionable, and it is not averred that the plaintiff lost a marriage.

1 Lev. 261, *Barnes v. Studd*.

In this case, the case of *Medhurst v. Balam*, 1 Roll. Abr. 35, in which an action had been holden to lie, for publishing these words of a single woman, *She is with child, and has taken physic for it*, by reason whereof she lost her reputation and the friendship of her neighbours, was denied to be law.

{ Where special damage is necessary to support the action, it is not sufficient to prove a mere wrongful act of a third person induced by the slander ; but the special damage must be the legal and natural consequence of the slander.

8 East, 1, *Vicars v. Wilcocks* ; 2 Bos. & Pul. 284, *Morris v. Langdale*. }

|| The loss of employment as preacher to a dissenting congregation at a licensed chapel, from which the plaintiff derived profit, is a sufficient temporal damage resulting from slanderous words to enable the plaintiff to sue for them ; and it is sufficient in the declaration to allege, that persons frequenting the chapel had refused to permit plaintiff to preach there, and had discontinued the emoluments which they would otherwise have given him, without naming the persons, or showing by what authority they excluded the plaintiff, or that the plaintiff was duly qualified as a preacher according to the stat. 10 Ann. c. 2.

Hartley v. Herring, 8 Term R. 130 ; and see *Burr. R.* 2424.

So, also, the loss of a substantial pecuniary benefit, resulting from the hospitality and entertainment afforded to the plaintiff by friends, in receiving plaintiff at their houses, is a sufficient temporal damage to enable the plaintiff to maintain an action.

Moore v. Meagher, 1 Taunt. 39.

If the damage sustained by reason of the slander be a mere wrongful act of a third person, or a breach of contract by such third person with the plaintiff, this is not sufficient to sustain the action ; for in these cases the

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plaintiff's remedy is against the third party. The special damage must be the legal and natural consequence of the slander.

Vicars v. Wilcocks, 8 East, 1; and see 2 Bos. & Pul. 284.¶

(D) Certain Circumstances which are to be regarded in the Construction of Words.

1. *The Time when the Words were published.*

As the same words are not at all times understood in the same sense, words which were once actionable may not now be so; and, on the other hand, an action may now lie for words for which an action would not heretofore have been.

β Although words are not actionable in themselves, they may become so, when spoken of a man in his official or professional character, if they impute to him want of skill, dishonesty, or any other matter which renders him unfit for the occupation or profession he fills. *Anonymous*, 1 Ohio, 83, note.γ

The consequence to an agent of doing the same thing may, at least in the eye of human law, which in punishing an action considers only how far society is thereby prejudiced, at different periods of time be very different. An act of witchcraft, heretofore a capital offence, is by a late statute declared to be no offence; (α) and many offences are at this day felonious which were formerly no more than trespasses. It follows, that the lying of action for the publication of words which import the charge of an offence, does in a great measure, if not altogether, depend upon the state of the law as to that offence at the time they were published.

¶(α) 9 Geo. 2, c. 5.¶

The sense of the words for which the action is brought, at the time they were published, is not only to be regarded in construing them; but the rule of construing those words, which did at that time prevail, is likewise to be regarded.

In ancient times, actions for words were very rare; an action of this kind being seldom brought, except the slander was great and of dangerous consequence.

4 Rep. 15, *Stanhope v. Blith*.

Afterwards, actions for words were brought so frequently, that the judges, in conformity to a very sensible maxim, *malitiæ hominum est obviandum*, made it a rule to construe the words *in mitiori sensu*.

As the mischief, notwithstanding this rule was carried very far, did continue, it was declared by a statute, "That in an action upon the case for slanderous words, if the jury do find or assess the damages under forty shillings, the plaintiff shall recover only so much costs as the damages found or assessed amount unto."

21 Jac. c. 16.

After the making of this statute, actions upon the case for words grew less frequent; for, as the judges, for some time, adhered to the rule of construing the words *in mitiori sensu*, the injured party, instead of obtaining satisfaction, was frequently put to the expense of paying his own costs.

This being perceived, such licentiousness, both in speaking and writing, prevailed, that it became necessary for the judges, in conformity to the maxim on which the contrary practice had been established, to encourage actions for words.

Of late years, the rule has been, to construe words in that sense which is most natural and obvious; it having been found by experience, that

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unless men can obtain a satisfaction by law for the damage sustained from the publication of slanderous words, they will take it themselves.

10 Mod. 198, *Harrison v. Thornborough*. {The rule of construing words *in mitiori sensu* has been long superseded; and slanderous words are now understood by the courts in the plain and popular sense in which the rest of the world naturally understand them. 5 East, 463, *Woolnoth v. Meadows*; 9 East, 93, *Roberts v. Camden*; 3 Cain. 76, *Pelton v. Ward*; 1 Dall. 114; 2 Dall. 59; 2 Binn. 37, *Brown v. Lamber-ton*.} ¶The rule which at one time prevailed, that words should be understood *in mitiori sensu*, which was adopted to discourage frivolous actions for slander, has been exploded so long ago as the time of Lord Hardwicke; and words are now construed by courts, as they ought always to have been, in the plain and popular sense in which the rest of the world naturally understand them. 9 East, 96; Cowp. 278; 5 East, 472, 473; *Demarest v. Haring*, 6 Cowen, 76; *Ca. temp. Hardw.* 839.¶ The following judicious remarks, which give a history of the rules which have been adopted in the construction of slanderous words, are extracted from Hammond's *Nisi Prius*, pp. 281, 282, and 283. "Before I proceed to the main object of our disquisitions, I should first premise, that the cares of legislation in the ruder ages of our society, were exclusively devoted to the preservation of liberty and of property, and so far as legal annals are a guide, it was long ere character became an object of solicitude, or slander had place in the list of civil injuries. The first recorded attempt was made in the reign of Edward the Third; but it arose under circumstances so peculiar, that it was not considered as furnishing a precedent by analogy to serve for future occasions, and from that period to the reign of Henry the Eighth, the attempt was not once renewed. Under the dominion of this sovereign, however, the right to a pecuniary satisfaction for defamatory words was fully established, but its establishment occasioned such an inundation of suits, that it was afterwards deemed a matter of policy to discourage the action of slander, as far as could be done without shaking the basis upon which it rested; and in furtherance of this policy a rule obtained, that in deciding in a given case whether expressions should be accounted defamatory, the mildest interpretation of which they were susceptible should be given to them. Hence it came to pass, that ingenuity was, upon these occasions, continually set at work, to devise a meaning which by some very remote possibility the speaker might have intended, and in the exercise of this talent examples occur which border somewhat upon the ludicrous. Thus, we find it gravely asserted by the great judge Dodderidge, that to say of a man who was gaining his livelihood by buying and selling, he is a base, broken rascal, has broken twice, and I'll make him break the third time, '*ne poel dar porter action, car poel estre intend de burstness de belly*.' And again, upon another occasion, it was the opinion of a gallant serjeant, that to call a man a thief was not to slander him, 'for perhaps,' said he, 'the speaker might mean he had stolen a lady's heart.' In the course of time this policy was abandoned, and amongst other consequences, the rule which now governs in the construction of words is, that they shall be interpreted in that sense in which mankind in general would apprehend them. It is, however, most important to remember, that a contrary policy did at one time obtain, in order that we may reject as authorities the host of decisions which sprung out of it. Decisions, perhaps, are binding, so far only as they uphold legal principles; and if, after a time, the principles upon which they are founded are given up, they ought in reason to fall with them. Again, we are to reflect, and the reflection is of the greatest moment, that the value of reputation in distant ages was comparatively small to the price it justly bears at the present day; for as society advances in refinement, and as its relations become more and more extended, the value of character is proportionably enhanced. Therefore, it is not a conclusive argument against an action for slander to say, that the point was some centuries, or even perhaps one century ago, decided the other way: the answer is, slight inconveniences may be long overlooked or endured, but when abuses grow to a certain pitch, and become excessive and intolerable, it is due to justice, that the law do apply a remedy to reform them. But, however well founded this theory may be, we shall find in the further progress of our inquiry, that decisions which had their original in the obsolete policy mentioned before, are still upheld: nor, as it would seem, has the law extended its remedies according to the exigencies of the times. To the one or the other of these two causes must we attribute any deficiencies, if any such there be, which are discoverable in this branch of our jurisprudence."¶

2. *The Place where the Words were published.*

If words, which have a slanderous signification in a certain place, are

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published in that place, an action lies; although it would not, for publishing the same words in another place.

If these words, *He is a daffidown-dilly*, are published of a barrister in the north of England, where the words *daffidown-dilly* signify *ambidexter*, an action lies.

Cart. 214, *Annison v. Blofield*.

If these words, *He has strained a mare*, are published by J S in that part of the kingdom where the words *strained a mare* signify *carnally known a mare*, an action lies.

Cro. Eliz. 250, *Coles v. Haviland*.

If these words, *He is a healer of felons*, are published of J S, in one of the western counties, wherein the words *a healer of felons* signify a *concealer of felons*, an action lies.

Hob. 126, Anon.

If these words, *He is mainsworn*, are published of J S in one of the northern counties, wherein the word *mainsworn* signifies *perjured*, an action lies.

Hob. 126, *Slater v. Franks*.

It is not necessary to ascertain the meaning of such English words as have a local signification by an averment; for it is to be presumed, that the judge, before whom the action for the words is tried, understands the meaning of such English words; and if he do not, it may be learnt from the witnesses.

1 Roll. Abr. 86, pl. 1.

3. *The language the Words were published in.*

An action does not lie for slanderous words, unless they were published in a language which was understood by some one person who heard them; for if the words were not understood by any person, no damage can be received from the publication thereof.

1 Roll. Abr. 74, *Jones v. Dawkes*. See as to proper manner of declaring on words in a foreign language. *Wormouth v. Cramer*, 3 Wend. 394.

But, if the meaning of the words were understood by one person, an action lies, although they were published in a foreign language; for the consequence is equally bad to the person to whom they relate, as if the words had been English.

Cro. Eliz. 855, *Price v. Jenkins*; Ibid. 496.

An action lies for publishing these words of J S, *He is an idoner*, the word *idoner* being a Welsh word, which, in English, means *perjured*.

Hob. 126, Anon.

If slanderous words are published of J S, in the French language, an action lies.

1 Roll. Abr. 59, *Delaporte v. Cook*.

It is not necessary to show by an averment what the meaning of words published in a foreign language is in English, (a) it being the duty of the judge, before whom the action for the words is tried, to receive information as to the meaning of the words in English, from persons who know it.

Hob. 126, Anon. [(a) *See quære*, for though it be indispensably necessary to set forth the original words, yet, it seems, the plaintiff should also translate them, and show their application to him. *Zenobio v. Axtell*, 6 Term R. 163.

(D) Circumstances regarded in the Construction of Words.

4. *The Occasion of publishing the Words.*

The occasion of publishing slanderous words is much to be regarded ; for *sensus verborum ex causâ dicendi accipiendus est*.

4 Rep. 14, Lord Cromwell's case. ¶See p. 60.¶

A barrister may, in pleading his client's cause, speak words, for which, if published on another occasion, an action would lie ; for it is the duty of an advocate to say every thing he is informed of, which is material for his client, and an action would lie against him for not doing his duty : but, if an advocate speak slanderous words, which are not material to the issue, he is liable to an action.

Cro. Ja. 90, Brooke v. Montague, Trin. 3 Jac. 3 Words spoken by a president-judge in confidence and without malice, in the discharge of his official duty, are not actionable. Goodenow v. Tappan, 1 Ohio, 60. Nor words by counsel in the course of judicial proceedings. Hoar v. Wood, 3 Metc. 193 ; nor by a member of the legislature in the course of his official duty. Coffin v. Coffin, 4 Mass. 1. See Commonwealth v. Blanding, 3 Pick. 310 ; Bradley v. Heath, 12 Pick. 163 ; Harcourt v. Harrison, 1 Hall, 474.¶

In another report of this case, 1 Roll. Abr. 87, it is laid down, that what an advocate says for his client, in mitigation of damages, is justifiable ; although it be not precisely material to the issue.

In a subsequent case it was holden, that an action does not lie for any words spoken by an advocate for his client, in mitigation of damages, although the words were not directly material to the issue : because they were spoken in his profession, and for the good of his client.

Hob. 328, Hughes's case, Pasch. 18 Jac.

Another case, subsequent to both these, goes still farther. In this it is laid down, that no action lies against an advocate for speaking slanderous words in defending his client's cause ; it being his duty to speak for his client, and it shall be intended that he spoke according to his instructions.

Styles, 462 ; Wood v. Gunston, Mich. 7 Car. 2 ; 2 Ring v. Wheeler, 7 Cowen, 725.¶

¶Where the words are pertinent to the matter in issue, no action lies against the advocate, although the words may be considered by the court as too strong.

Hodgson v. Scarlett, 1 Barn. & A. 232.¶

Prick, a clergyman, in preaching a sermon, recited the following story, out of Fox's Martyrology ; namely, that one Greenwood, being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God. An action being brought for these words by Greenwood, who was present at the sermon, it was ruled by Wray, Ch. J., before whom the cause was tried, that, as the words had only been recited as a story, Prick was not guilty of publishing them maliciously ; and he was found not guilty. The opinion of Wray, Ch. J., was afterwards affirmed to be good law ; and judgment was given for the defendant.

Cro. Ja. 91, Prick's case.

¶After hearing that the defendant had uttered the slander to others, the plaintiff went to him to inquire of him of the truth of the report, and the defendant repeated the slander : held, that the fact that he spoke the slanderous words in answer to the plaintiff's interrogatories in the last instance, was not a justification, and did not destroy the plaintiff's right of action.

Gordon v. Spencer, 2 Blackf. 288.

(D) Circumstances regarded in the Construction of Words.

The prosecutor stated to a constable, confidentially, the crime charged and its circumstances, informing him that he should prosecute, and desiring him to serve the process; held, that this was slander and not excused by the circumstances.

Burlinghame v. Burlinghame, 8 Cowen, 141.

A memorial presented to a board of excise, remonstrating against granting a license to a particular individual to keep a tavern, and charging him with stirring suits for the purpose of having the causes tried at his tavern, is a privileged communication.

Vanderzee v. M'Gregor, 12 Wend. 545.

Words actionable, in themselves, when spoken between members of the same church, in the course of religious discipline, and without malice, will not support an action.

Jarvis v. Hathaway, 3 Johns. 180.

Words used by an attorney in detailing a statement of a case to a person to whom he applies to become security, on the bringing of a writ of error, are to be deemed made in the course of judicial proceedings, and, it seems, are privileged.

Blunt v. Zuntz, Anth. N. P. 180.*g*

5. *The Intention in publishing the Words.*

An action does not lie for the publication of slanderous words, if it appear that the publisher had no intention to injure the person to whom they relate: *Quia quæ ad unum finem locuta sunt, non debent ad alium detorqueri.*

4 Rep. 14, Lord Cromwell's case.

It was holden, that an action did not lie for publishing these words, *I have heard J S was hanged for stealing a horse*, because it appeared that they were published out of concern, and not with an intent to slander J S.

1 Lev. 82, *Crawford v. Middleton*.

If A say to B, *You are forsworn*, and B reply, *Will you say I am perjured?* and A answer, *Yes, if you will have it*, no action lies; for the explanation of the word *forsworn* is rather drawn from A than spoken with design.

Cro. Eliz. 297, *Livermore v. Martin*.

An action does not lie for speaking these words, *I will give my mare a quarter of a peck of malt, and let her drink, and she shall piss as good beer as J S, a brewer, brews*; for it shall be intended, that the words were spoken in jest, and not with intent to injure J S.

1 Roll. Abr. 58, *Fenn v. Dixie*.

[Nor will an action lie for a character of a servant, communicated in confidence to one who asks it from the former master or mistress.

Weatherston v. Hawkins, 1 Term R. 100. See st. 32 G. 3, c. 56.] {*Buller*, 8, *Edmonson v. Stevenson*; 5 Esp. Rep. 14, *King v. Waring*; 3 Bos. & Pul. 587, *Rogers v. Clifton*. A master, who is applied to for the character of a servant, is not called upon, in an action, to prove the truth of the character given, but it lies on the servant to prove the falsehood of it. And the master is justified unless the servant prove also express malice. 1 Term 110, 3 Bos. & Pul. 587.}

||But if malice in the master is to be inferred from the circumstances, then such action will lie. Although a master be not in general bound to prove the truth of a character given by him of his servant, yet if he offi-

(D) Circumstances regarded in the Construction of Words.

ciously desire a former master of the servant not to give him a character, and state some trivial misconduct of the servant in order to prevent the former master giving such character, and afterwards, on application to himself for a character, give the servant a bad character, the truth of which he is not able to prove, the jury from these circumstances may infer malice in an action brought by the servant.

Rogers v. Clifton, 3 Bos. & Pul. 587. *β* See Edmonson v. Stevenson, Bull. N. P. 8; Hodgson v. Scarlett, 1 Barn. & Ald. 240.*γ*

It does not necessarily follow that the statement of the master is malicious, because it is volunteered by him without any inquiry made by a third party.

Patteson v. Jones, 8 Barn. & C. 578; and see Child v. Affleck, 9 Barn. & C. 403, and Vol. VI. tit. *Libel*.

If the words are spoken confidentially, on advice being asked upon any matter, no action lies, unless *express* malice can be shown.

3 Term R. 61.

β No action lies for presenting a petition to the appointing power of the state in reference to the conduct of the plaintiff, although false, unless malice be proved.

Vanderzee v. M'Gregor, 12 Wend. 545; King v. Root, 4 Wend. 113; Thorn v. Blanchard, 5 Johns. 508; Howard v. Thompson, 21 Wend. 319; O'Donaghue v. M'Govern, 23 Wend. 26; Gray v. Pentland, 2 Serg. & R. 23. See Fairman v. Ives, 5 B. & Ald. 642; S. C. 1 Dowl. & Ry. 252; and title *Libel*, A.

A person who makes a communication on matters of business by or to persons interested in the subject-matter of the communications, although they affect the character and credit of the plaintiff, is not liable to an action, unless malice be shown.

Prosser v. Bromage, 4 Barn. & Cress. 247; Spike v. Cleyson, Cro. Eliz. 541; M'Dougall v. Claridge, 1 Campb. 267; Dunman v. Bigg, 3 Campb. 260; Cockayne v. Hodgkinson, 5 Carr. & Payne, 543; Shipley v. Todhunter, 7 Carr. & Payne, 680; Todd v. Hawkins, 8 Carr. & P. 88; Delany v. Jones, 4 Esp. 191; Knight v. Gibbs, 3 Nev. & M. 467.

Where the words were spoken by one subscriber of a charity to another, as to the conduct of the plaintiff, the medical attendant on the objects of the charity; held, that a claim of privilege to so large an extent could not be sustained.

Martin v. Strong, 5 Ad. & Ell. 535; S. C. 1 Nev. & P. 29.

A party is justified in stating his opinion *bona fide* of the respectability of a tradesman inquired about.

Storey v. Challands, 8 C. & P. 234.*γ*

In *ordinary* actions of slander express malice need not be shown; it is presumed from the slander itself; malice *in law* not meaning (like malice *in fact*) ill-will against an individual, but merely a *wrongful act intentionally done without lawful cause or excuse*. Where, therefore, the slander is not published under any of those circumstances which render it a privileged communication, it is never a question of fact for the jury whether it was malicious or not. When the circumstances render it a privileged communication, and there be *no* evidence of malice, there the plaintiff must be nonsuited; but if there be *any* evidence of express malice, then it becomes a question for the jury whether the communication were made honestly or from malice.

Bromage v. Prosser, 4 Barn. & C. 274. As to malice, see Starkie on Slander, chap. xiii. (2 ed.) See 1 Camp. 268, note.

(E) Words published in a Course of Justice.

If a party, whose property has been stolen, on reasonable grounds of suspicion, charge an innocent person with stealing it, he is not liable to an action for slander.

Fowler v. Horner, 3 Camp. 293.

So, where defendant, a brewer, who had sold beer to the plaintiff on the guarantee of A B, and with a promise to A B to inform him of any default in plaintiff's payments, told A B that plaintiff wanted to cheat him, that he had sent back, as unretailable, beer which he had himself adulterated, that he was a rogue, rascal, &c., the defendant was held not liable in an action for slander, since under the circumstances his communication was privileged. He had a right to state to A B what he thought of plaintiff's conduct in their mutual dealings; and even if his representations were intemperate and unfounded, still, if he really believed them at the time to be true, he could not be said to have acted *maliciously*, and with *intent to defame* plaintiff. As, however, some of the defendant's expressions were unwarrantable, Lord Ellenborough left it to the jury to say whether they were used maliciously to degrade plaintiff, or with good faith to communicate the facts.

Dunman v. Bigg, 1 Camp. 268, note; and see M'Dougall v. Claridge, Ibid.; 4 Esp. Ca. 191; Fairman v. Ives, 5 Barn. and A. 642.

If the jury find that words alleged by defendant to have been spoken by way of admonition were not spoken maliciously, and this is recorded as a verdict for defendant, the court will not disturb the verdict.

Wilson v. Stephenson, 2 Price R. 282.¶

(E) In what Cases Words published in a Course of Justice are actionable.

To prevent persons from being deterred, by the fear of actions, from doing what justice requires, words otherwise actionable are not so when published in a course of justice.

Another reason may be given, why an action does not lie for words published in a court of justice; namely, that if the words are not true, the publisher may be indicted for perjury.

It is in one case laid down, that an action does not lie for slanderous words contained in a complaint in a course of justice, although it would for publishing the same words upon an extrajudicial occasion.

Cro. Eliz. 247, Buckley v. Wood.

It is in divers books laid down, that an action does not lie for slanderous words contained in a bill of indictment.

3 Leon. 138; 4 Rep. 14; Cro. Eliz. 247; 1 Saund. 132.

If A say to B, *I charge you with felony*, an action lies.

1 Roll. Abr. 43, Basy v. Child. ¶See Davis v. Noak, 1 Stark. Ca. 377; Harrison v. King, 4 Price, 46.¶

But if A charge B with felony before a justice of the peace, an action does not lie; for, if an action did in such case lie, felons would frequently escape for want of prosecution.

4 Rep. 14, Cutler v. Dixon; Hob. 82; ¶Fowler v. Horner, 3 Camp. 293; Johnson v. Evans, 3 Esp. 32.¶

β In a suit before a justice the defendant turned towards the plaintiff, who had been examined before the justice as a witness, and who had just finished his testimony, and said to him, *You have sworn a manifest lie*, held that the words were actionable. But, it seems, that if in the course

(E) Words published in a Course of Justice.

of his argument the defendant had said that he would prove the testimony of the plaintiff to be false, he would not be liable, although he might fail in the proof.

Kean v. M'Laughlin, 2 Serg. and Rawle, 469.g

If J S exhibit articles of the peace in the Court of King's Bench against J N, and J N being in court say in the hearing of the court, *There is not a word of truth in those articles, and I will prove it by forty witnesses*, no action lies; although the words amount to a charge of perjury, the articles having been exhibited upon oath; because they were said by J N in defence of himself.

1 Roll. Abr. 87; Moulton v. Clapham, 2 Jon. 431.

An action does not lie against a witness for speaking slanderous words in giving evidence, this being in a course of justice.

Cro. Eliz. 230, Buckley v. Wood.

||If a party, in fairly defending himself against a claim in a court of justice, speak words imputing felony to the plaintiff, he is not liable to an action; but if he go out of the way to utter them maliciously, then an action lies.

Trotman v. Dunn, 4 Camp. 211. As to words spoken by advocates, see p. 63.||

If a bailiff, having a warrant to arrest J R, upon a writ issuing out of the Court of Chancery, make an affidavit, that he did arrest him, and that he was rescued by J S, and J S be thereupon committed to the Fleet, no action lies; because the affidavit was made in a course of justice.

1 Roll. Abr. 43, Aier v. Redgwit; 4 Rep. 14.

If J S, after having presented a petition to the House of Commons, in which slanderous words are contained, deliver printed copies thereof to the members of that house, no action lies; it being agreeable to the order and course of parliament to deliver copies of such petitions.

1 Saund. 133, Lake v. King.

||But if a member publish a report of a speech delivered by him in the House of Commons, containing libellous matter, he is liable to indictment for libel, since such publication is not according to the order and course of parliament.

The King v. Creevey, 1 Maul. and S. 273; and see tit. *Libel*.||

No action lies for slanderous words contained in articles of the peace; notwithstanding the person against whom the articles were exhibited was put to the expense of entering into a recognisance for keeping the peace.

4 Rep. 14, Cutler v. Dixon.

A, who had exhibited a libel in a spiritual court against B for defamation, produced C as a witness. Hereupon B made an allegation in writing, as the course of such court is, that C was perjured in a cause between E and F at the assizes at G, in order to prevent C being admitted as a witness. It was holden, that, as the court had jurisdiction in the original matter, an action did not lie against B, for that, if an action did in such case lie, it would prevent the detection of bad witnesses.

1 Roll. Abr. 33, Westover v. Dabbinet.

If J S had, when that court was in being, charged J N with felony or

(F) Words in the past or future Tense actionable.

piracy, by a bill in the court of Star Chamber, an action would have lain ; because as that court had no jurisdiction in either of these offences, the exhibiting of the bill was not a proceeding in a course of justice.

4 Rep. 14, Buckley v. Wood.

Words spoken of the plaintiff by a defendant, in an ecclesiastical proceeding before a presbytery of the Presbyterian church, in the course of his defence upon charges made by the plaintiff, are not actionable, provided the speaker does not designedly and maliciously wander from the point, for the purpose of slander.

M'Millan v. Birch, 1 Binn. 178. See Swearingen v. Birch, 4 Yeates, 322; Vigours v. Palmer, 1 P. A. Bro. 40.

{So as to words spoken between members of the same church, in the course of their religious discipline, and without malice ; and the jury are to decide whether there be malice or not.

3 Johns. Rep. 180, Jarvis v. Hatheway.

So also as to words spoken to a committee, intrusted with the management of the business of a volunteer corps, against a member, as being an improper person to be permitted to continue a member.

5 Esp. Rep. 109, Barbaud v. Hookham.}

Upon the whole, it appears, that no action lies for the publication of slanderous words in a course of justice : but, if the publication be accompanied with any circumstance of malice, an action upon the case in the nature of a writ of conspiracy (a) lies ; and it is highly reasonable such action should lie, otherwise a bad man would, under the pretence of doing what justice requires, have it in his power to publish the vilest slander.

||(a) The action in such case need not be in nature of a writ of conspiracy, but a common action on the case for slanderous words, which will lie where malice appears, although the words were uttered in the course of a judicial proceeding : see 4 Camp. R. 211.||

(F) In what Cases Words in the past or future Tense are actionable.

It is in the general requisite to the making of words actionable, that they should be in the present tense ; but an action does sometimes lie, although the words are in the past or future tense. The distinction seems to be, that where it is probable that the party, to whom the words relate, will receive the same or nearly the same damage from words in the past or future tense, as if they had been in the present tense, the words are actionable ; but that where this is not probable, they are not so.

An action lies for publishing these words of J S, *He was perjured, or he hath committed perjury* ; for a man may at any distance of time be prosecuted for perjury.

1 Roll. Abr. 39, Rayner v. Grimstone.

So for publishing these words of J S, *I think, in my conscience, if he might have his will, he would kill the king* ; for the words may be the occasion of his ruin.

1 Roll. Rep. 427, Sidnam v. Mayo ; 1 Roll. Abr. 49.

So for publishing these words of a tradesman, *he will within two days become a bankrupt* ; for the words may ruin his credit.

Latch. 114, Hill's case ; 1 Roll. Abr. 49.

(G) How far Words must be affirmative, in order to render them actionable.

But no action lies for publishing these words of J S, *He has had the pox*; for it is probable that he is cured, and then no person will avoid his company.

Stra. 1189; Taylor v. Hall, 1 Roll. Abr. 48. Vide *suprà*, acc.

So none lies for publishing these words of a justice of peace, *He was a debauched man, and was not fit to be a justice of peace*; for he might formerly have been debauched and unfit, but may not be so now.

1 Roll. Abr. 48, Hammond v. Kingsmill.

(G) How far Words must be affirmative, in order to render them actionable.

In order to render words actionable, they must to a certain degree be affirmative; but it is not necessary that they should be directly so.

An action lies for publishing these words of J S, *I think, or I dreamed he committed a certain felony*; for, although the words are not directly affirmative, J S may by reason of the words be arrested, upon suspicion of having committed that felony.

Cro. Eliz. 348, Smith v. Wiscome.

So, for publishing these words, *I think, in my conscience, if J S might have his will, he would kill the king*.

Cro. Car. 407, Sidnam v. Mayo; 1 Roll. Abr. 49.

[So, for these words, *I am thoroughly convinced that you are guilty, &c.*, for *I am thoroughly convinced* is equal to a positive averment; for a man only avers a thing because he is convinced of the truth of it.

Oldham v. Peake, 2 Bl. Rep. 959.]

If A speak these words to B, *If you had your deserts, you had been hanged for felony*, an action lies; for, although a condition be annexed, the words amount to a charge of felony.

Brownl. 3, Harris v. Adams.

But, if A say to B, *Thou deservest to be hanged, or thou hast done that for which thou deservest to be hanged*, no action lies; for the words do not amount to a charge of any particular crime; they being only a general declaration of the opinion which A entertains of B.

1 Roll. Abr. 43, Hake v. Moulton; Ibid. pl. 5.

An action lies for publishing these words of a woman, *She hath had a child, and if she hath not a child she hath made it away*, for they import a charge of murder.

Cro. Eliz. 639, Redstone v. Pomfreict; 1 Lev. 261.

If these words are spoken to J N, *You are as great a rogue as J S who stole quilts*, an action lies; for, notwithstanding the words are comparative, they amount to a charge that J N did steal quilts.

Com. 267, Upton v. Fold.

So, for saying to J N, *You are as arrant a thief as any in England*.

Cro. Ja. 687, Foster v. Browning.

So, for publishing these words, *As sure as God governs the world, and King James this kingdom, J N hath committed treason*.

Sid. 53, Dacey v. Clinch.

So, for publishing these words, *J S says I am a perjured rogue, he is perjured as well as I*.

1 Lev. 65, Orton v. Fuller.

(G) How far Words must be affirmative, in order to render them actionable.

An action lies for publishing these words, *I know what I am, and I know what Snell is, I never buggered a mare*; for the words amount to a charge of buggery.

2 Lev. 150, Snell v. Webling.

If J N speak these words to J S, *You are a rascal and a villain; you have forgot since you lived in Black Bull Yard, there you could procure broad money for gold, and clip it when you had so done, and then the shears could go*, an action lies; for the words amount to a charge of having been guilty of clipping, the power to clip having been the same in any other place as in Black Bull Yard.

Ld. Raym. 1185; Speed v. Perry, Salk. 697.

If it be said to J S, *When wilt thou bring home the nine sheep thou stolest from J N?* the words are actionable; for, although spoken interrogatively, they amount to a charge of stealing sheep.

1 Roll. Abr. 48; Hunt v. Thimblethorpe, Cro. Ja. 568.

An action lies for saying to J N, *Did you hear that J S is guilty of treason?*

12 Rep. 134, Earl of Northampton's case.

If A, the wife of B, be asked by C, *Why will you hang D?* and she answer, *For breaking our house in the night, and stealing our goods*, the words are actionable; for, notwithstanding they are spoken in answer to a question, they amount to a charge of stealing goods.

1 Roll. Abr. 50, Hayward v. Nayler.

An action lies for publishing these words, *I will prove, or I make no doubt to prove, that J S has committed a certain felony*; for the words amount to a much stronger affirmation than if the words had been, *J S has committed a certain felony*.

1 Roll. Abr. 50, Webb v. Poor; Cro. Eliz. 569.

So, for saying to A, *Go tell B he is a thief*.

Roll. Abr. 80, Hendy's case.

So, for speaking these words to J S, *You brought fire, to set the house which was burnt on fire*.

Hutton, 123, Glazier v. Heliar.

An action lies for publishing these words of J S, *He was whipped for stealing sheep*; for the words are tantamount to the words, *J S was convicted of stealing sheep*.

1 Roll. Abr. 50, Churley v. Hill.

It has been holden, that no action lies for publishing these words of J S, *He is in jail for horse-stealing*; for an innocent person may be suspected and imprisoned.

Hob. 177, Steward v. Bishop, Trin. 14 Jac.

But it was holden, in a subsequent case, that an action lies for publishing these words of J S, *I will bring him to jail for stealing a mare*; inasmuch as they contain a charge of felony; and the case of Stewart v. Bishop was denied to be law.

1 Lev. 82, Crawford v. Middleton, M. 14 Car. 2.

[So, these words were holden actionable, *He was put into the roundhouse*

(H) How far Words must be certain, in order to render them actionable.

for stealing ducks at Crowland, they being alleged to be spoken falsely and maliciously.

Beaver v. Hides, 2 Wils. 300.

If A say to B, *One of us two are perjured, and it is not I*; the words are as much actionable as if A had said to B, *You are perjured.*

1 Roll. Abr. 75, Coe v. Chambers.

It is not actionable to say of the plaintiff *that he, or somebody, had altered the credit or endorsement of a note from a larger to a less sum, and that the note would speak for itself.*

Ingalls v. Allen, Breeze, 233.g

An action lies for publishing these words of J S, *We will have him stand in the pillory, and have his ears for perjury*: for they amount to an affirmation that J S has been guilty of perjury.

1 Roll. Abr. 50, Pell v. Jellow.

So, for publishing these words of J S, *He gave ten pounds to A for forswearing himself in Chancery*; for they amount to a charge of subornation of perjury.

1 Roll. Abr. 41, Ewer's case.

(H) How far Words must be certain, in order to render them actionable.

It is to a certain degree necessary, to the rendering of words actionable, that the meaning of the words be certain; and that the person, to whom the words relate, be described with certainty.

It is not actionable to publish these words of J S, *He is no true subject of the king*; for the word *true* is of uncertain signification, and no person is so true a subject as he ought to be.

1 Roll. Abr. 69, Smith v. Turner.

It has been holden, that an action does not lie for publishing these words of J S, *He is a rebel*; inasmuch as a commission of rebellion may have issued against him from the Court of Chancery.

1 Roll. Abr. 69, Redstone's case.

It has been holden that no action lies for publishing these words of J S, *He has stolen furze*; for the publisher might mean furze growing, the stealing of which is only a trespass.

1 Roll. Abr. 70, Gilbert's case, M. 9 Car. 1.

But an action would at this day lie for such words, the person who unlawfully cuts furze having, by a statute made since this case, been rendered liable to the punishment of whipping.

15 Car. 2, c. 2.

It has been holden, that no action lies for saying to J S, *Thou gettest thy living by swearing and forswearing*; for, as a man may be entitled to the fines set upon persons guilty of perjury, the words do not import a charge of perjury.

Cro. Eliz. 888, Stanhope's case.

It has likewise been holden, that if A say to B, *Thou art forsworn, and didst take a false oath at the assize at Hertford*, no action lies; for the oath may have been taken in a private house, and not in a court.

1 Roll. Abr. 42, Pritchard v. Smith.

These two cases were determined when the rule of construing words

(I) How Want of Certainty in Words may be supplied.

in mitiori sensu was carried very far: but there is no doubt that it would at this day be holden that an action would lie in both cases.

8 Mod. 24; 4 Rep. 15; Ld. Raym. 959.

No action lies for publishing these words of J S, *He hath delivered untruths upon oath, in his answer to a bill in Chancery*, the charge being uncertain; for many things in the bill might not be material to the matter in question, and the giving of a false answer to such things was not perjury.

Cro. Eliz. 500, *Brown v. Mitchell*. ¶But there can be little doubt that these words would now be held actionable.¶

No action lies for saying to J N, *Thou hast forged my hand*, unless it be added, to what writing; the charge being too general.

3 Leon. 231, Anon. [*Sed vide supra*, (B) 4, this case overruled.]

No action lies for saying to J S, *Thou hast committed burglary, in breaking his house, and taking his goods*, it being uncertain, as no person is named, whose house and goods were meant.

1 Roll. Abr. 71, *Brown v. St. John*. ¶But these words would seem clearly actionable, as they impute a specific crime, it being shown whose house and goods were meant.¶

If three men have given evidence, and J S say to them, *One of you three is perjured*, neither of them can maintain an action against J S, it being uncertain which of the three J S did mean.

1 Roll. Abr. 81, *Brown's case*.

So, if these words are published by J N, *One of my brothers is perjured*, no action lies; it being uncertain which of his brothers was intended.

Cro. Ja. 107, *Wiseman v. Wiseman*. βWhere a slander is published against a class or aggregate body of persons, an individual member cannot maintain an action for it. *Ellis v. Kimball*, 16 Pick. 132.γ

βWhen a charge is made against a class of society, a profession, an order or body of men, and cannot by possibility import a personal application tending to private injury, no action lies. But for an injury to his business, resulting from such charge, an individual may maintain an action, although such charge may affect the business of others engaged in the same calling; as, where the charge was that certain malting establishments on the hill in Albany were supplied with water from stagnant pools, gutters, and ditches for the purpose of carrying on their business, the owner of one of these establishments, who averred that he had an establishment on the hill, &c., and that the publication was made to injure him, was holden to be entitled to maintain an action.

Ryckman v. Delavan, 17 Wend. 52; 23 Wend. 186. See *Sumner v. Buel*, 12 Johns. 475.

When words have a covert meaning, being spoken in ironical, oblique, or ambiguous terms, if the declaration in such case contains an averment that the words were spoken with an intent to charge a crime, it will be good.

Andrews v. Woodmansee, 15 Wend. 232.γ

(I) By what Means the Want of Certainty, sufficient to render Words actionable, may be supplied.

1. *By the Intention of the Speaker.*

THE want of certainty, sufficient to render words actionable, may, as to the meaning of the words, be supplied by the intention of the publisher.

(I) How Want of Certainty in Words may be supplied.

If these words are published of a woman, *She lay with a weaver in a ditch, and his breeches were down, and they were at it*, an action lies ; inasmuch as the publisher must mean that the weaver had carnal knowledge of her.

1 Roll. Abr. 66, *Roote v. Molyn*.

An action lies for publishing these words of a woman, *She is a whore, and hath had the pox, and hath holes one may turn his finger in ; Mr. Ring the apothecary gave her a drink for it ; take heed how you drink with her* ; the great pox being apparently intended by the publisher.

Cro. Ja. 430, *Miller's case* ; 1 Roll. Abr. 66.

So, for saying to J S, *Thou art a pockey rogue ; and the pox haunts thee twice a year* ; for, as only the great pox does more remarkably affect persons therewith afflicted in the spring and fall, the speaker must mean that pox.

1 Roll. Abr. 67, *Prekington's case*.

Upon a motion in arrest of judgment, for publishing these words of a barrister, *He is a dunce, and will get little by the law*, it was insisted, that although dunce signifies a person of slow parts, such person may have solid judgment ; and that the other words do only mean, *that he will not give himself the trouble to practise the law*. Judgment was given for the plaintiff ; and by the court—Words are to be construed in their usually received sense. The word *dunce*, in the common acceptation thereof, means *a person of dull apprehension, and not fit to be a lawyer* ; and the obvious meaning of the words, *he will get little by the law*, is, *he will deserve to get little by the law*.

Cro. Car. 382, *Peard v. Johns* ; 1 Roll. Abr. 55.

It was insisted, in order to arrest of judgment, that these words, *Thou art a thief of every thing*, are not actionable ; because, as the stealing of some things, for instance, of fruit growing on a tree, is not felony, a person cannot be a thief of every thing. Judgment was given for the plaintiff ; and by the court—The publisher must mean that the plaintiff was a thief of every thing of which he could be a thief.

Stray. 142, *Morgan v. Williams*.

An action lies for publishing these words of J S, *He is perjured* ; for the intention of the publisher must be, to charge J S with having sworn falsely in a court of justice.

2 Buls. 150, *Croford v. Blisse*.

2. By an Averment.

The want of certainty sufficient to render words actionable may, as to the description of the person to whom the words relate, be supplied by an averment ; it being a maxim, that *certum est quod certum reddi potest*.

If these words are published, *That perjured rogue and villain Potter*, any person of the name of Potter may maintain an action, if it be averred, that, at the time of publishing the words, there was a *colloquium* concerning him ; and that they were published of him.

1 Roll. Abr. 85, *Potter v. Loveday*.

If these words are published, *Captain Nelson is a thief*, an action lies for *Robert Nelson*, if it be averred that there was at the time of publishing the words a *colloquium* concerning him, and that they were published of him ;

(I) How Want of Certainty in Words may be supplied.

it not being necessary to aver that he was at that time a captain, or usually called so.

1 Roll. Abr. 85, *Nelson v. Smith*.

If it be said by J S, in a *colloquium* concerning six defendants to a bill in chancery, *These defendants are those who helped to murder J S*, any one of the defendants may maintain an action; if it be averred that at the time of speaking the words there was such *colloquium*; and that he was one of the defendants.

1 Roll. Abr. 75, *Foxcroft v. Lacy*.

If these words are published, in a *colloquium* concerning J S, *Mr. Deceiver has deceived the king*, J S may maintain an action, if it be averred, that at the time of publishing the words there was such *colloquium*; and that he was at that time one of the king's receivers; although it be not averred, that at the time of publishing the words there was a *colloquium* concerning his office of receiver; for, as it is averred, that, at the time of publishing the words, he was one of the king's receivers, it shall be intended, that they were published concerning his office of receiver; and if an action could be avoided, by a trick of calling a person *Mr. Deceiver*, instead of *Mr. Receiver*, slander would often go unpunished.

Cro. Ja. 557, *Fleetwood v. Curle*; 1 Roll. Abr. 57.

If A B say to C D, before whom E F is walking, *He that goeth before thee is perjured*, an action lies, if it be averred that only E F was walking before J N at the time of speaking the words, and that they were spoken of him.

1 Roll. Abr. 81, *Aish v. Gerish*.

If it be said by J S to J N, *Thy master Brown hath robbed me*, any person by the name of Brown, if it be averred that the words were spoken of him, may maintain an action, although it be not averred that he was the master of J N, of whom the words were spoken; for it shall not be intended that J N had more than one master of the name of Brown.

Cro. Ja. 444, *Brown v. Lowe*; 1 Roll. Abr. 79.

In an action upon the case, the plaintiff declared that the defendant, being his natural brother, published these words of him, *My brother is perjured*. Upon a motion in arrest of judgment, Yelverton, J., was of opinion that the action did not lie; and by him—Words, in order to render them actionable, ought to be so certain as to the description of the person to whom they relate, that every person who hears them may know of whom they are published. The defendant may have several brothers; and it would be very unreasonable that every one of them should maintain an action, by averring that the words were published of him. Williams, J., was of opinion, that the action lay; and by him—As the plaintiff has averred, that the words were published of him, and the jury have found the defendant guilty, the court is ascertained, that the words were published of the plaintiff. Tanfield, J., was likewise of opinion that the action lay; and by him—If the words had been, *One of my brothers is perjured*, an action would not have lain, because it would then have appeared to the court that the defendant had more than one brother, and the want of certainty to which brother the words related would not have been cured by the averment and the verdict; but as it does not now appear to the court that the defendant had any other brother than the plaintiff, and it is averred that the words were published of him, and the jury have found the defend-

(K) When Words construed *in mitiori sensu*.

ant guilty, the plaintiff ought to have judgment. The cause being afterwards moved in full court, it was resolved by all the justices, that the action did lie; and judgment was given for the plaintiff.

Cro. Ja. 107, Wiseman v. Wiseman.

In an action upon the case, the plaintiff declared, that the defendant published these words of him, being a justice of the peace, *He for malice and spleen did many times wrest the law, and pervert justice, to serve his own turn*. It was objected, in order to arrest judgment, that it doth not with sufficient certainty appear that the words were published of the plaintiff; it not being averred that at the time of publishing them there was a *colloquium* concerning him. Judgment was given for the plaintiff; and by the court—It is the usual course, and sufficient, to aver, that the words were published of the plaintiff. The judgment was affirmed upon a writ of error.

Cro. Ja. 241, Beaumont v. Hastings.

In an action upon the case the plaintiff declared, that the defendant published these words of him, *He is a thief*. It was objected, in order to arrest judgment, that the words cannot be applied to the plaintiff more than to any other person; it not being averred that at the time of publishing them there was a *colloquium* concerning the plaintiff. Judgment was given for the plaintiff; and by the court—It is sufficient to aver that the words were published of the plaintiff, and the jury by finding a verdict for the plaintiff have found that the words were published of him, which helps the case; for otherwise they would have found the defendant not guilty.

Cro. Ja. 673, Smith v. Ward.

If it be averred, that in a *colloquium* between the plaintiff and defendant, the defendant said, *Thou art a thief*, an action lies, although it be not averred, that the words were spoken of or to the plaintiff; for, as they were spoken in a *colloquium* between the plaintiff and defendant, it must be intended that they were spoken to the plaintiff.

1 Roll. Abr. 85, Bishop v. Fitzherbert.

||But if the words “of and concerning the plaintiff” be omitted altogether, the indictment or declaration will be bad, notwithstanding it be alleged that defendant, intending to vilify plaintiff, spoke the words, &c.

Rex v. Marsden, 4 Maul. & S. 164.||

(K) In what Cases doubtful Words are to be construed *in mitiori sensu*.

WHEREVER doubtful words will fairly bear one sense in which they are not actionable, and another in which they are, they ought to be construed in that sense in which they are not actionable.

1 Roll. Abr. 71, Gardiner v. Spurdance; {4 Esp. Rep. 218, Harrison v. Stratton.} The sense in which words are received by the world, is the sense which courts of justice ought to ascribe to them in slander. Andres v. Koppenheaver, 3 S. & R. 255; Walton v. Singleton, 7 S. & R. 451; Hays v. Drierly, 4 Watts, 392. See *antè*, D. 1.

The rule, of construing doubtful words *in mitiori sensu*, does not only coincide with the general tenderness of the English law, but it is authorized by the two following maxims: *Benignior sensus in generalibus et dubiis præferendus*. *Verba sunt accipienda in mitiori sensu*.

No action lies for speaking these words to J S, *Thou art a corn-stealer, and hast stolen my corn off my land*; for it is doubtful whether the speaker

(L) When Words not construed in *mitiori sensu*.

meant corn cut, or corn growing; and by construing the words in *mitiori sensu* they mean corn growing, the stealing of which is only a trespass.

1 Roll. Abr. 70, pl. 50.

No action lies for publishing these words of J S, *He did burn my barn*; for that, by construing the words in *mitiori sensu*, they mean a barn which had no corn in it, nor was parcel of a mansion-house, the burning of which is not felony.

4 Rep. 20, Barham's case.

It has been holden, that no action lies for publishing these words of an innkeeper, *He is a maintainer of thieves, and keepeth none but thieves in his house, and I will prove it*; because the publisher did not add, that the innkeeper knew the persons whom he maintained to be thieves; for a person may have thieves in his house and maintain them without knowing them to be thieves, which is no offence.

Cro. Eliz. 746, Ball v. Bridges.

It has likewise been holden, that no action lies for publishing these words of J N, *He hath poisoned J S, innuendo quendam J S adtunc defunctum, and it shall cost me a hundred pounds but I will hang him*; for the words *adtunc defunctum*, besides being contained in the *innuendo*, can only relate to the time of the declaration, and consequently it is not averred that J S was dead at the time of publishing the words.

Cro. Ja. 343, Jacob v. Mills; Hob. 6, S. C.

It has been holden, that no action lies for publishing these words, *Sir Thomas Holt struck his cook on the head with a cleaver and cleaved his head; the one part lay on one shoulder, and another part on the other*; because it is not averred that the cook was killed; and by the court—Slander ought to be direct, against which there ought not to be any intendment: but in this case, notwithstanding the wounding, the cook may be living, and then it is only a trespass.

Cro. Ja. 184, Holt v. Astrigg. ||See observation of Lawrence, J., 5 East, 468.||

At the times the three last cases were determined, the rule of construing words in *mitiori sensu* was carried very far: but it is doubtful whether any one of them be at this day law.

||The rule of construing slanderous words in *mitiori sensu* is now exploded; and it is not now requisite that the words should necessarily bear a slanderous import, and no other, in order to be actionable; it is sufficient, if in their ordinary and general acceptation they bear such import, and the courts will understand them as common persons would do.

Carpenter v. Tarrant, Selw. N. P. 1157; Oldham v. Peake, Cowp. 275.

Thus where the defendant said of the plaintiff, *That his character was infamous, that he would be disgraceful to any society, that those who proposed him as a member of any society must have intended to insult it, that he would publish his shame and infamy, that DELICACY forbade him from bringing a direct charge, but it was a MALE child who complained to him* (defendant); such words were held, according to the above rule of construction, to mean a charge of unnatural practices without the aid of any averment or innuendo.

Woolnoth v. Meadows, 5 East, 463, Roberts v. Camden, 9 East, 96.||

(L) In what Cases doubtful Words are not to be construed in *mitiori sensu*.

HOWEVER agreeable it may be to the general tenderness of the English law, that doubtful words should be construed in *mitiori sensu*, yet such

(L) When Words not construed in *mitiori sensu*.

construction is only to be made where the meaning of the words in the usual acceptation thereof is doubtful ; for, if in the *usual acceptation of the words* they are slanderous, a forced construction shall not be put upon them, in order to render them not actionable.

1 Roll. Abr. 71, Gardiner v. Spurdance ; Skin. 364, Somers v. House. ¶ Vide *suprà*.
¶ Words are now construed in the sense they are usually understood. See *antè* D. 1. §

If it be said to a woman, *Thou hast poisoned thy husband, and I will justify it*, the words, if it be averred that her husband is dead, are actionable ; for although it be possible, that she might give him poison involuntarily or ignorantly ; or, that he might not die thereof ; or, that he might live a year and day after taking it, these are foreign intendments ; for the meaning of the words, in the usual acceptation thereof, is, that she gave him poison voluntarily, knowing it to be poison, and that he died thereof in a short time.

1 Roll. Abr. 71, Gardiner v. Spurdance.

If these words are spoken to J N, *Thou hast killed J S*, an action lies ; for although the killing may have been as an executioner or by accident, the words, in the usual acceptation thereof, mean a felonious killing.

1 Roll. Abr. 72, Gardiner v. Spurdance.

In an action for publishing these words, *You did shut up my sister and murder her, and I will prove it* ; the judgment of the Court of Common Pleas was for the plaintiff ; and the judgment, notwithstanding many old cases were cited to the contrary, was affirmed in the Court of King's Bench.

Stra. 1130, Rivers v. Lite.

An action lies for speaking these words to J S, *Thou art forsworn in a court of record*, although the speaker did not add, in giving evidence ; for it shall not be intended, unless this be shown in the pleadings, that J S was forsworn in ordinary discourse in some court of record.

Cro. Car. 510, Ceely v. Hoskins.

So for saying to J N, *You have procured J S to come thirty miles to commit perjury before my Lord of Winchester, and have given him ten pounds for that purpose*, although it be not averred that J S did commit perjury ; or that the Bishop of Winchester was a person before whom it could be committed ; for the words shall be taken in the worst sense.

Cro. Ja. 158, Harris v. Dixon.

If these words be spoken to J S, *You have stolen my wood*, an action lies ; for the word *wood*, according to the old rule, *Arbor dum crescit, lignum dum crescere nescit*, means wood cut down.

Cro. Ja. 166, Lo v. Sanders.

It has been holden, that an action lies for publishing these words, *John Baker stole my box-wood, and I will prove it* ; and by Holt, C. J., " Wherever words tend to slander a man and to take away his reputation, I shall be for supporting actions for them, for the preservation of the peace. I remember a story told by Mr. Justice Twisden of a man who had brought an action for slanderous words, who, being in court when the rule for arresting judgment in the action was made absolute, declared in court, that if he had thought he should not have recovered in his action he would have cut the defendant's throat."

Ld. Raym. 959, Baker v. Pierce.

Upon a motion in arrest of judgment in an action for words, it appeared,

(M) In what Cases adjective Words are actionable.

that the words in one count were, *Thou art a sheep-stealing rogue*; that the words in another count were, *It sounds everywhere that thou art a sheep-stealer*; and that there was a general verdict. Judgment was given for the plaintiff; and by the court—Divers old cases have been cited, in which it is laid down, that if words can be construed by the court in such sense as not to be actionable, they ought to be so construed: but it is at this day settled, that the words are to be construed by the court *in that sense wherein they are generally understood*.

Sayer, 265, Gardiner v. Atwater. ||See 9 East, 96; Cowp. 278; 5 East, 472, 473.||

It was heretofore holden that an action did not lie for publishing these words, *I charge J S with felony for taking money out of my pocket, and I will prove it*; for that, as the words do not expressly charge the taking to be felonious, it may be intended that it was not a felonious taking.

Hutt. 58, Mason v. Thompson; 2 Lev. 51; 2 Ventr. 213.

But in a modern case this case is expressly denied to be law; and by Holt, C. J., *Taking money out of a person's pocket must mean a felonious taking*.

Ld. Raym. 959, Baker v. Pierce.

If these words be spoken to J S, *Thou didst violently upon the highway take my purse from me, and four shillings and two-pence in it; and didst threaten to cut me off in the midst, but I was forced to run away to save my life*, an action lies: for, although it be not expressly said that J S did rob the speaker, or that he took his purse feloniously, the words, in the common acceptation thereof, amount to a charge of a robbery.

Cro. Car. 277, Laurence v. Woodward; 1 Roll. Abr. 74.

An action lies for speaking these words of a widow, *I have had the use of her body*; for it shall not be intended that the words mean the use of her body as a physician, or that she had done some bodily labour for the speaker; but the words shall be construed in their usual sense, which is very slanderous.

Cro. Ja. 162, Morrison v. Cade.

If these words are published of a woman, *She is a lewd and common woman of her body, and has the pox*, an action lies; it being apparent that the speaker meant the French pox.

1 Roll. Abr. 66, pl. 14.

(M) In what Cases adjective Words are actionable.

AN action does not in the general lie for the publication of adjective words.

If these words are published of J S, *He is a seditious knave*, an action does not lie; because the words only import a charge of an inclination to be guilty of some seditious act, and such inclination is not punishable at the common law.

4 Rep. 19, Britridge's case.

If these words are published of J S, *He is a thievish rogue*, an action does not lie; because the words do not import a charge of being a thief.

Cro. Ja. 600, Stamp v. White.

But, if adjective words are published which import a charge of having been guilty of a criminal act, an action does lie.

(N) In what Cases Words which import only an Intent are actionable.

If these words are published, *I accuse J S of poisoning his aunt*, an action lies ; because the words import a charge of having poisoned his aunt.

1 Roll. Abr. 49, pl. 6.

If these words are spoken to J S, *Thou art a bugging rogue, and I could hang thee*, an action lies ; because the words import a charge of having committed the act of buggery.

Sid. 373, Collier v. Burrel.

If these words are published of J S, *He was whipped about Taunton Castle for stealing sheep*, an action lies ; because the words not only import a charge of having stolen sheep, but likewise that J S was convicted of that offence.

1 Roll. Abr. 50, Churley v. Hill.

If these words are spoken to J S, *Thou art a sheepstealing rogue*, an action lies ; because the words import a charge of felony.

Sayer, 265, Gardiner v. Atwater.

If adjective words are a disgrace to a person in an office, or to a person of a profession or trade, an action lies ; although they do not import a charge of having done any act.

If these words are published of a person in an office, *He is a corrupt officer*, an action lies ; the words being a disgrace to him in his office.

4 Rep. 19, Britridge's case.

If these words are published of a tradesman, *He is in a breaking condition*, an action lies ; because his credit, which is of the utmost consequence to a tradesman, may be thereby hurt.

Styles, 425, Walkenden v. Haycock.

(N) In what Cases Words which import only an Intent are actionable.

It is said to have been determined, upon great deliberation, that no action lies for words which only import the charge of a purpose, or an intent to commit a crime ; such purpose or intent not being punishable.

4 Rep. 16, Eaton v. Allen.

An action does not lie for publishing these words of J S, *He keepeth men to rob me*, inasmuch as these words only import a charge of an intention to rob.

1 Roll. Abr. 51, Lock v. Lock.

And, for the same reason, an action does not lie for speaking these words to J N, *You would have killed me*.

1 Roll. Abr. 51, Pott's case.

If these words are published of a woman, *She would have cut her husband's throat, and did attempt to do it*, an action lies ; for the attempt being a criminal act, the words are a great slander.

1 Roll. Abr. 51, Scot v. Hilliers.

An action lies for saying to A B, *You are a rascal and a villain ; you have forgot since you lived in the Black Bull Yard ; there you could procure broad money for gold, and clip it when you had so done, and then the shears could go* ; for, where the power to do an act is, by the words, confined to a particular place, they imply that the act was done, the power being the same in all places.

Ld. Raym. 1185 ; Speed v. Parry, Salk. 695.

(P) Cases of Repugnancy in the Words.

So, for publishing these words, *J N lay in wait on Shooter's Hill to rob J S*, for the lying in wait was a criminal act.

1 Roll. Abr. 50, Lock v. Lock.

Upon a motion in arrest of judgment, in an action for publishing these words of J N, *He would have robbed the house of J S, if J D would have consented unto it; he persuaded J D unto it, and told him he would bring him where he should have money enough*; it was said, these words do not import any act for which the plaintiff could be called in question. Judgment was given for the plaintiff; and by the court—The words are a great discredit and slander.

Cro. Eliz. 710, Leversage v. Smith.

(O) In what Cases disjunctive or copulative Words are actionable.

If the words published of any person are in the disjunctive, and part thereof be not actionable, no action lies.

If it be said to J S, *Thou hast stolen my mare, or didst consent to the stealing of her*, no action lies; because the latter words are not actionable.

Cro. Eliz. 780, Griffith's case.

It was holden, that an action did not lie for publishing these words, *Sparham did steal a mare, or else Godwin is forsworn*, notwithstanding there was an averment that Godwin never swore any such matter: and by the court—The words do not import a charge sufficiently direct to make them actionable.

Cro. Ja. 530, Sparham v. Pye.

If some words, which are not actionable, be connected by a copulative with others which are so, an action lies.

If these words be published of J N, *He did steal, and cozened seven quarters of my barley*, an action lies, notwithstanding the words, *he cozened seven quarters of my barley* would not alone have been actionable.

Win. 45, 102, Crompton v. Philpot.

(P) In what Cases an action does not lie by reason of Repugnancy in the Words.

As the ground of an action for publishing words is the damage to the person of whom they were published, it follows, that, if there be in the words themselves, or in what appears upon the record, such repugnancy, that no damage can ensue to the person of whom they were published, the words are not actionable.

It has been holden, that if a feme covert say to J S, *You have stolen my goods*, the words are not actionable; because the words, inasmuch as a feme covert, who has no goods, cannot be robbed of any, are in themselves repugnant.

1 Roll. Abr. 74 b, pl. 1, Anon. Pasch. 11 Jac.

But the contrary has been holden, in two other cases; one of which was subsequent, the other antecedent to this case.

In an action brought against husband and wife, for the publication of these words by the wife, *My turkeys are stolen and Charnel hath stolen them*, it was objected, in order to arrest the judgment, that inasmuch as the wife could have no turkeys, it could not be true that the plaintiff had stolen her turkeys; and consequently the words could not be any discredit to him. Judgment was given for the plaintiff: and by the court—The wife did

(Q) When Action lies for repeating Words.

charge the plaintiff with stealing turkeys ; and if a person who had no horse were to publish these words, *J S hath stolen my horse*, the discredit would be as great to J S as if the publisher had had a horse ; for every person who heareth the words might not know whether he had a horse or no.

Cro. Eliz. 279, Charnel's Case, Pasch. 34 Eliz.

In an action brought against husband and wife, for the publication of these words by the wife, *J S hath stolen my fagots*, it was objected, in order to arrest judgment, that the words are repugnant ; inasmuch as a married woman cannot have any goods which can be stolen. Judgment was given for the plaintiff ; and by the court—The words which are to be understood according to common intendment, amount to a charge of stealing the husband's fagots ; and wherever an action is brought for words importing a charge of stealing goods, it is not material whose the goods were.

Cro. Ja. 600, Stamp v. White and wife, Mich. 18 Jac.

If, in an action for words which import a charge of killing, it appear from the declaration that the person who is said to have been killed is living, no action lies : inasmuch as it is no slander to any person to charge him with having killed a person who is not dead ; because there can be no danger of a prosecution in such case.

4 Rep. 16, Snagg v. Gee.

It has been holden, upon a writ of error in the Exchequer Chamber, that no action lies for speaking these words to J K, *Thou hast killed the servant of J S*, unless it be averred that some servant of J S was killed.

Cro. Ja. 331, Barton v. Bell.

But in divers of the cases, some of which are antecedent, others subsequent to this case, it is laid down, that words importing a charge of having killed a person are actionable ; although it be not averred that the person was killed ; unless it appear from the words themselves, or from the record, that he is living.

Cro. Eliz. 569, 823 ; Sid. 53 ; 1 Ventr. 117, 149.

(Q) In what Cases an Action lies for repeating Words which were published by another Person.

It was heretofore the practice, in an action for repeating words which had been published by another person, to aver that the words were not published by that person.

In an action brought by a woman against A, for saying that B had reported, *that he had had the use of her body*, it was averred that B had never made such report.

Cro. Ja. 162, Morrison v. Cade.

In an action brought by Lewis against Walter for these words, *Piers did say, that Lewis did say, that there was no prince in England*, it was averred that Piers did never say, that Lewis did say, *there is no prince in England*.

Cro. Ja. 406, Lewis v. Walter.

But in a modern case, upon a motion in arrest of judgment, these words, *Thou art a sheepstealing rogue, and farmer Parker told me so*, were holden to be actionable, although it was not averred that farmer Parker did not

(Q) When Action lies for repeating Words.

tell the defendant so; and by Dennison, J.—Such averment is by no means necessary: it not being material whether farmer Parker did or did not tell the defendant so.

Sayer, 266, Gardiner v. Atwater. ||Woolnoth v. Meadows, 5 East, 469.|| ¶ See Binns v. M'Corkle, 2 P. A. Browne's R. 89; Hersh v. Ringwalt, 3 Yeates, 508.¶

|| It is laid down extrajudicially in Lord Northampton's case, that if J S publish that he hath heard J N say, that *J G was a traitor or thief*, in an action on the case, if the truth be such, he may justify. But, if J S publish that he hath heard *generally, without a certain author*, that J G was a traitor or a thief, there an action on the case lieth against J S, for this, that he hath *not given to the party grieved any cause of action against any but himself*, who published the words.

12 Rep. 134.

But it is no justification to disclose by a plea to an action for slander, that a certain named person told the matter to the defendant, unless the defendant disclose the name at the time of repeating the slander.

Davis v. Lewis, 7 Term R. 17.

And, in pleading such a justification, it is not sufficient to allege that the original slanderer used such and such words, *or to that effect*; the defendant must give the very words used, though it be only necessary to prove some material part of them.

Maitland v. Goldney, 2 East, 426.

¶ If at the time the defendant repeated the words, he gave the name of the author, so that the party injured might have an action against him, this will be a complete justification.

Binns v. M'Corkle, 2 Browne's R. 89. But it has been holden that the repetition of such words is actionable. Hampton v. Wilson, 4 Dev. 468. See Starkie on Slander, 340; the note of Judge Wendell, in the law, is reviewed as to the justification of the defendant when he gives up the author.¶

It is now settled, that such a plea is no justification to an action for *written* libel; since, even supposing that a party may lawfully repeat verbal slander which he has heard, provided he name the author, he is by no means justified in disseminating it in writing or print: and a very learned judge (Holroyd, J.) lately expressed great doubts as to the doctrine of Lord Northampton's case respecting oral slander, observing that the book in which it was found is not so accurate as the rest of the reports of Lord Coke, not having been published by him in his lifetime, but from notes afterward. And it seems that, in order that a party may be justified by naming the original author of the slander, it must be repeated without malice, and on a fair and justifiable occasion.

De Crespigny v. Wellesley, 5 Bing. 392; and see McGregor v. Thwaites, 3 Barn. & C. 24; Lewis v. Walter, 4 Barn. & A. 605, 614. By the two first statutes respecting *scandalum magnatum* the propagator of such scandal was only to be imprisoned till he discovered its first author, and Mr. Starkie in his learned Treatise (p. 338, 2d ed.) observes, that if this were the law when the slander affected men of the highest rank, it is not easy to suppose that a stricter rule could be applied where the slander affected subjects of inferior degree. But it is to be observed that these statutes render the utterers of false scandal punishable *criminally*, and it does not necessarily follow, that because a party under these statutes were entitled to his discharge from *imprisonment* by giving up the author of the scandal, this must then have been a good defence for him in a civil action. See Mr. Borthwick's observations. Law of Libel, p. 291, 297.||

(R) In what Cases actionable Words are rendered not actionable; or Words not actionable are rendered actionable, by subsequent Words.

As the intention of publishing words is to be collected from the whole words, it must sometimes happen, that the sense of words which would have been actionable if no others had been published at the same time, is so changed by subsequent words as to be rendered not actionable.

When this is the case, the subsequent words are said to be explanatory.

If these words are published, *Master Britridge is a perjured old knave; and that is to be proved by a stake parting the land of J S and J D*, no action lies; for, although the former words would have been actionable, their meaning is so explained by the subsequent words, as to make it evident, that a false swearing in a court of justice was not intended.

4 Rep. 19, Britridge's case.

If these words are spoken to J S, *Thou art a thief; for thou hast stolen my apples out of my orchard*, no action lies; it appearing from the latter words, that the whole words only import a charge of a trespass.

4 Rep. 19, Britridge's case.

If it be said to J N, *Thou art a thief; for thou tookest my beasts, by reason of an execution, and I will hang thee*, no action lies; for, however the speaker might be mistaken as to the nature of the offence, it appears from the latter words, that the whole words only import a charge of a trespass.

1 Roll. Abr. 51, Wilk's case.

||So, where defendant said of plaintiff, *Thompson is a d——d thief, and so was his father before him; and I can prove it*; but added, *Thompson received the earnings of the ship, and ought to pay the wages*, the words were held not actionable; for, taken together, it was clear they did not intend to impute felony.

Thompson v. Bernard, 1 Camp. 48; and see Christie v. Cowell, Peake's Ca. 4; Tempest v. Chambers, 1 Stark. Ca. 67.||

If J S say to J N, *Thou art a thief; and hast stolen my trees*, no action lies; it appearing from the latter words, that the whole words only import a charge of a trespass.

Cro. Ja. 674, Smith v. Ward. {Vide Peake, N. P. 4, Christie v. Cowell.}

If J S say to J N, *Thou hast ravished a woman; and I will make thee stand in a white sheet*, no action lies, it appearing from the latter words, that only such offence as is punishable in a spiritual court was intended by the speaker.

Cro. Ja. 666, Ridges v. Mills.

{Where words otherwise actionable are explained at the time by reference to a particular transaction, which is known not to amount to the charge which the words would otherwise import, they shall be construed accordingly, and will not be actionable.

1 Johns. Ca. 279, Van Rensselaer v. Dole.}

It must on the other hand sometimes happen, that the sense of words which would not have been actionable, if no others had been published at the same time, is so changed by subsequent words as to be rendered actionable.

When this is the case, the subsequent words are said to be accumulative.

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No action lies for speaking these words to J S, *You are a rogue*; but, if the words had been, *You are a rogue of record*, an action would have lain; inasmuch as the whole words would then have imported a charge of having been convicted of a crime.

1 Roll. Abr. 43, *Allesley v. Mawdit*.

||To say of a tradesman, *He lives by swindling and robbing the public*, is actionable, though the transaction alluded to amount only to a fraud. But in such case the words must not be laid, innuendo *that plaintiff was guilty of felony and robbery*; but, innuendo that he was guilty of *fraud*.

Smith v. Carey, 3 Camp. 461.||

No action lies for speaking these words to J N, *Thou art a rebel*; but, if the words had been, *Thou art a rebel, and all that keep thee company are rebels, and thou art not the queen's friend*, an action would have lain; inasmuch as it would have appeared from the whole words, what kind of rebel the speaker intended.

Cro. Eliz. 638, Redstone v. Elliot, 1 Roll. Abr. 69.

No action lies for saying to A B, *Thou art forsworn*: but an action would have lain if the words had been, *Thou art forsworn and I will set thee on the pillory*; for it would then have appeared, that such forswearing was meant as A B may be set on the pillory for.

1 Roll. Abr. 70, pl. 46.

If these words are spoken to J S, *Thou art a clipper, and thy neck shall pay for it*, an action lies; inasmuch as it appears from the whole words that a clipper of money was intended.

3 Lev. 116, *Maden v. Micocke*.

It was in two cases holden, that for speaking these words to J N, *Thou art a thief, for thou hast stolen a tree*, no action did lie; because the latter words were explanatory, and only showed the reason of calling thief; but that if the words had been, *Thou art a thief, and hast stolen a tree*, an action would have lain; inasmuch as the word *and* would have made two distinct sentences of the words, in which case the latter words would have been accumulative.

Cro. Ja. 114, Minors v. Leeford, Hil. 3 Jac.; *Cro. Ja. 231, Gyer v. Ormsted*, Trin. 7 Jac.

But in a subsequent case, wherein these words were spoken to J N, *Thou art a thief, and hast stolen twenty load of my furze*, it was holden, that no action did lie: and by the court—The words, *and thou hast stolen*, and the words, *for thou hast stolen*, according to the common acceptation of the words, mean the same thing.

Hob. 331, Clerk v. Gilbert, Trin. 17 Jac. 1.

The doctrine laid down in the case of *Clerk v. Gilbert* has been since adhered to.

Ld. Raym. 960, Baker v. Pierce.

(S) Of the Pleadings in an Action for Words.

1. In the general.

If two persons have published words, for which an action lies, an action cannot be maintained against them jointly; the publication of one not being the publication of the other.

Cro. Ja. 647, Chamberlain v. White and another; *Palm. 313*; [2 Burr. 984.]

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If words for which an action lies have been published of two persons, they cannot join in an action against the publisher; the damage to one not being a damage to the other.

Dyer, 19; Yelv. 129; Cro. Car. 512; *β* Glass v. Stewart, 10 Serg. & Rawle, 222.*g*

||But if words be spoken of two partners, respecting their *trade*, they may sue jointly, averring special damage.

Cook v. Batchelor, 3 Bos. & Pul. 150; Solomons v. Medex, 1 Stark. Ca. 191.||

β Slander of the husband and slander of the wife cannot be joined in the same action.

Ebersoll v. Krug, 3 Binn. 552.*g*

It is by the 21 Jac. 1, c. 16, enacted, "That all actions upon the case for words shall be brought within two years after the words spoken, and not after."

It has been holden, that this statute does not extend to an action for words which become actionable by reason of the special damage received from them.

1 Sid. 95; Cro. Car. 193; Salk. 206.

In the declaration in an action upon the case, it was alleged that the defendant spoke of the plaintiff divers false and scandalous words, of which the *tenor* follows:—*Thou art an arrant whore and an old worm-eaten jade, and one of thy sides hath been eaten out with the pox.* It was holden, upon a motion in arrest of judgment, that the declaration is bad because it is not alleged expressly that the defendant spoke these words; and by the court—Some words which would, perhaps, have rendered the rest not actionable may have been omitted. It is sufficient to plead a deed or record by way of recital, because the recital may be compared with the deed or record: but if there be a mistake in the recital of words spoken, no recourse can be had to any thing by which the mistake may be corrected.

Cro. Eliz. 857, Garford v. Clark. ||But this seems not now to be law, since it is now settled that the word "tenor" implies a recital *verbatim*, Dougl. 193; and where a libel is set out (as frequently done) "to the tenor and effect following," the word *tenor* governs the word *effect*, and binds the party to set out the very words. 3 Barn. & A. 506. To state that defendant spoke scandalous words *in substance* as follows, is bad after verdict. 11 Mod. 78, 84; Rep. temp. Hard. 306; Wright v. Clement, 3 Barn. & A. 503; and see 3 Maul. & S. 110.||

β A declaration which charged that the defendant spoke of the plaintiff "in substance the following false, scandalous, and defamatory words," was holden good.

Kennedy v. Lowry, 1 Binn. 393. See 3 Watts, 90.*g*

In the declaration in an action upon the case it was alleged, that the defendant spoke certain words which were actionable; and then the declaration went on, *cumque etiam postea* the defendant spoke other words which were likewise actionable. A verdict being found for the plaintiff, and entire damages being given, it was objected, in order to arrest the judgment, that the latter words are not alleged positively, but by way of recital; and divers cases were cited, where judgment had been arrested in actions of trespass, because it was only alleged, *cum* the defendant committed the trespass. Judgment was given for the plaintiff; and by the court—This being an action upon the case, and the former words being laid positively, the latter shall be intended to be positive. The words *cumque etiam* are, in divers

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dictionaries, said to mean the same as *porro*, and in that sense they are used by some of the best Latin authors.

3 Lev. 338; *Cotteril v. Matthews*, 2 Lev. 193. β The plaintiff may charge words which are not actionable with others which are actionable in themselves, in the same count, in aggravation of damages. *Dioyt v. Tanner*, 20 Wend. 190.γ

Upon a motion in arrest of judgment, in an action upon the case, it was insisted, that it was only alleged in the declaration that the defendant spoke *hæc ficta falsa verba*; whereas it ought to have been alleged, *quod ficte et falso dixit*. The declaration was holden to be well enough.

1 Keb. 273, *Motley v. Slaney*. β See *Kennedy v. Gifford*, 19 Wend. 296.γ

A writ of error being brought upon a judgment in an action for words in themselves actionable, it was assigned for error, that it is only alleged that the words were spoken *falsely*; whereas it ought to have been alleged that they were spoken *falsely* and *maliciously*; but by the court—This is no error, for such words imply malice.

Noy, 35; *Mercer v. Sparks*, *Owen* 51; β 2 *Maule & Selw.* 379.γ

It is sufficient to allege in the declaration in an action for words, that the defendant spoke the words *palam et publice*; for the words *palam et publice* imply that the speaking was *in præsentia et auditu aliorum*.

Cro. Eliz. 861, *Taylor v. How*.

If the plaintiff in an action upon the case declare for the speaking of two sets of words, and only the first set are alleged to have been spoken *in præsentia et auditu quamplurimorum*, the *presentia et auditu quamplurimorum*, which is alleged as to the first set, shall go to the second.

2 Lev. 193, *Mors v. Thacker*.

[In an action for several sets of words, the first set were these: *That rogue J T*, (meaning the plaintiff,) *that set the house on fire*, (meaning the summer-house that was burnt in the occupation of one Mr. Cotton;) *and if anybody will give me charge of him, I will carry him to New Prison*. The fifth set were these: *J T* (meaning the plaintiff) *set the house on fire*, (meaning the same house.) It was moved in arrest of judgment, that the latter set of words were not actionable, for that every count in a declaration is a substantive count, and the *innuendo* (meaning the same house) shall not relate to the summer-house mentioned in the first set of words. But by the court—Although the latter set of words be not of themselves actionable, yet they shall have relation to the former set; and we must take them to have been spoken *maliciously*, as the jury have found for the plaintiff.

Tindal v. Moore, 2 Wils. 114.]

β Declaration charging that the defendant had said of the plaintiff as clerk of company, *You have done many things with the company for which you ought to be hanged, and I will have you hanged before, &c.*; *innuendo*, that the plaintiff had been guilty of felonies punishable by law with death by hanging, held sufficient, on motion in arrest of judgment.

Francis v. Roose, 3 Mees. & W. 191.γ

If it be alleged in the declaration in an action upon the case, that the words were spoken *in præsentia diversorum*, it is well enough; although it be not alleged that the speaking was *in auditu diversorum*; for as the words are alleged to have been spoken *in præsentia diversorum*, it shall be intended that they were spoken *in auditu diversorum*.

Cro. Eliz. 486, *Hall v. Hennesley*; *Noy*, 57.

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[If it be laid, that the defendant *in clauso ecclesiæ* Litchfield spoke the words, it has been holden, that the place not being laid as a *venue*, but as a description of the offence, it is a circumstance that must be proved. But if the words are laid to be spoken before A, and others, it is sufficient to prove them to be spoken before others only.

Bull. N. P.]

It is usual to allege in the declaration in an action for words, that the plaintiff is of good fame: but this is not traversable.

In the declaration in an action for words it was alleged that the plaintiff was of good fame. The defendant pleaded that, at the time of publishing the words, the plaintiff was not of good fame. The plea was holden to be bad; inasmuch as it only answers to a matter of inducement, which did not require any answer.

Stiles, 118, Strachey's case.

As the sense of words is to be collected from the consideration of the whole words, and of all the circumstances which attended the publication of them, if any of the words, or any circumstance which attended the publication of them, be omitted in the declaration of the plaintiff, the defendant may in his plea set out such of these as are material for him.

4 Rep. 13, 14, 19; Cro. Car. 510.

In an action for calling the plaintiff *perjured man*, the defendant pleaded in his justification, that the plaintiff was *perjured* in a certain cause, and judgment was for him. Another action being brought by the plaintiff for the same words, the defendant pleaded this judgment in bar, and it was holden to be a good plea.

2 Brownl. 49, Styles v. Baxter.

After judgment for the defendant in an action for these words, *He is a rascally alderman, a factious alderman, and a lampooner*, a second action was brought for the same words, with an averment that the word *lampooner* means *libeller*. The defendant pleaded in bar, that a former action was brought for the same words, except that the word *lampooner* is, in the declaration in the present action, averred to mean *libeller*. Upon a demurrer to this plea it was insisted, that by the explanation of the word *lampooner*, the present action is become a different action: but by the court—As the plaintiff has been once barred in an action for the same words, he shall never entitle himself to another action by an explanation of one of the words.

1 Lev. 248, Gardiner v. Helvis.

If the words alleged in the declaration are not actionable, no additional words in the replication can make them so; for the defendant cannot re-join to any words in the replication which are not contained in the declaration.

Styles, 70, Anon.

{And if the declaration is bad in substance, a plea confessing and justifying the words will not make it good.

Cro. Eliz. 416, Badcock v. Atkins; 3 Cain. 73, Pelton v. Ward. Vide Cro. Car. 288; W. Jones, 307; Alleyn, 7.}

[It was formerly holden, that the plaintiff must prove the words precisely as laid; but that strictness is now laid aside, and it is sufficient for the plaintiff to prove the substance of them. However, if the words be laid in the

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third person, *e. g.* *He deserves to be hanged for a note he forged on A*, proof of words spoken in the second person, *e. g.* *You deserve, &c.*, will not support the declaration: for there is a great difference between words spoken in a passion to a man's face, and words spoken deliberately behind his back.

2 Roll. Abr. 718; *Avarillo v. Rogers*, Bull. N. P. 5; *Rex v. Barry*, 4 Term R. 217.] {*Contra*, 1 Binn. 395, n., *Tracy v. Harkins*; B. R. H. 305, (291,) *Nelson v. Dixie*.—If the words are laid as spoken affirmatively, the declaration is not supported by proof of words spoken by way of interrogatory. 8 Term, 150, *Barnes v. Halloway*.}

{And as it is sufficient to prove the words substantially as laid, it is sufficient to allege in the declaration that the defendant spoke certain words *in substance as follows*.

1 Binn. 393, *Kennedy v. Lowry*; B. R. H. 305, (291,) *Nelson v. Dixie*. Vide Cro. Eliz. 645, *Hale v. Cranfield*; Ibid. 857, *Garford v. Clerk*; 3 Mod. 72, *Newton v. Stubbs*; 2 Show. 436, S. C.; 2 Johns. Rep. 12, *Ward v. Clark*.}

||If the words are laid as spoken affirmatively, the count is not supported by proof that the words were spoken by way of interrogation.

Barnes v. Halloway, 8 Term R. 150.

And in an action for saying of the plaintiff, "This is my umbrella; he stole it from my back door;" and the words proved were, "It is my umbrella, &c.;" it was held that the variance was fatal, inasmuch as the words laid applied to a thing present, and the words in evidence were spoken of a thing not present.

Walters v. Mace, 2 Barn. & A. 756. β There must in general be no variance between the words laid in the declaration and the proof. *M'Connell v. M'Coy*, 7 Serg. & R. 223; *Johnson v. Tait*, 6 Binn. 121; *Yundt v. Yundt*, 12 Serg. & R. 427; *Smith v. Buckecker*, 4 Rawle, 295; *Beehler v. Steever*, 2 Whart. 313; *Foster v. Small*, 3 Whart. 138.γ

So, in an action for slander of the plaintiff's wife, the words in the declaration were "H's wife is a great thief, and ought to have been transported seven years ago;" and the words proved were, "She is a d——d bad one, and ought to have been transported seven years ago," the proof was held not to support the declaration.

Hancock et ux. v. Winter, 2 Marsh, 502; and see 2 Stark. 194, 510. β It is sufficient if the plaintiff proves that the defendant spoke the words substantially the same as those laid in the declaration. 3 Yeates, 508; 1 Binn. 395; 2 Binn. 34.γ

The declaration must set out the words at length, and not their mere substance and effect. Therefore, where a declaration only alleged that the defendant falsely and maliciously charged and accused the plaintiff of being in insolvent circumstances, and set out special damage, after verdict the judgment was arrested.

Cook v. Cox, 3 Maul. & S. 110; and see 1 Marsh, 522; 3 Barn. & A. 503. || β But see *contra*, *Kennedy v. Lowry*, 1 Binn. 393; *Tipton v. Kahle*, 3 Watts, 90.γ

It is very dangerous for the defendant in an action for words to demur to the declaration; for he may, after taking the chance of trying the fact, avail himself of any matter in arrest of judgment, which would have been good upon a demurrer.(a)

4 Rep. 14 a; Doct. pl. 186. ||(a) That is, upon a general demurrer, but not of those defects of form which are only objectionable on special demurrer; as to which see 1 Saund. R. 228, 242 a; 2 Barn. & C. 283.||

2. In what Cases an Averment is necessary.

It was heretofore doubted, whether an action did lie for publishing

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words which import a charge of murder ; unless there was an averment, that the person said to be murdered is dead.

Yelv. 21 ; Sid. 53.

But it has been long settled, that an action does lie for publishing words which import a charge of murder, although it be not averred that the person said to be murdered is dead ; for that this shall be intended, unless it appear in the pleadings that he is alive.

Cro. Eliz. 569, 823 ; Cro. Car. 489 ; Sid. 53 ; 1 Ventr. 117, 149.

In an action upon the case, the plaintiff declared that the defendant, being his natural brother, published these words of him, *My brother is perjured*. Upon a motion in arrest of judgment, Yelverton, J., was of opinion that the action did not lie ; and by him—Words, in order to render them actionable, ought to be so certain as to the description of the person to whom they relate, that every person who hears them may know to whom they do relate. The defendant may have several brothers ; and it would be very unreasonable that every one of them should be able to maintain an action by averring that the words were published of him. Williams, J., was of opinion that the action lay ; and by him—As the plaintiff has averred that the words were published of him, and the jury have found the defendant guilty, the court is ascertained that the words were published of the plaintiff. Tanfield, J., was likewise of opinion that the action lay ; and by him—If the words had been, *One of my brothers is perjured*, an action would not have lain, inasmuch as it would then have appeared to the court that the defendant had more than one brother, and the want of certainty to which of the brothers the words did relate, could not have been cured by the averment and the verdict ; but as it does not now appear to the court, that the defendant had any other brother than the plaintiff, and it is averred that the words were published of him, and the jury have found the defendant guilty, the plaintiff ought to have judgment. This cause being afterwards moved in full court, it was resolved by all the justices, that the action did lie ; and judgment was given for the plaintiff.

Cro. Ja. 107, Wiseman v. Wiseman.

If these words are published, *Captain Nelson is a thief*, an action lies for Robert Nelson, if it be averred that there was, at the time of publishing the words, a *colloquium* concerning him, and that they were published of him ; it not being necessary to aver that he was, at that time, a captain, or usually called a captain.

1 Roll. Abr. 85, Nelson v. Smith. β In general an *innuendo* cannot supply the place of a *colloquium* ; yet if the *colloquium* sufficiently point the application of the words to the plaintiff, if spoken maliciously, he must have judgment. Lindsey v. Smith, 7 Johns. 359.γ

If it be said by J S to J N, *Thy master, Brown, hath robbed me*, any person of the name of Brown, if it be averred that the words were spoken of him, may maintain an action, although it be not averred that he was the master of J N, of whom the words were spoken ; for it shall not be intended that J N had more than one master of the name of Brown.

Cro. Ja. 444, Brown v. Lowe ; 1 Roll. Abr. 79.

In an action upon the case, the plaintiff declared that the defendant published these words of him, *He is a thief*. It was objected, in order to arrest the judgment, that the words cannot be applied to the plaintiff more than to any other person ; it not being averred that, at the time of publishing them, there was a *colloquium* concerning the plaintiff. Judgment was

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given for the plaintiff; and by the court—It is sufficient to aver, that the words were published of the plaintiff, and the jury, by finding a verdict for the plaintiff, have found that the words were published of him, which helps the case; for otherwise they would have not found the defendant guilty.

Cro. Ja. 673, *Smith v. Ward*. β See *Brown v. Lamberton*, 2 Binn. 34.

If it be averred, that in a *colloquium* between the plaintiff and defendant, the defendant said, *Thou art a thief*, an action lies, although it be not averred that the words were spoken of or to the plaintiff; for, as they were spoken in a *colloquium* between the plaintiff and defendant, it must be intended that they were spoken to the plaintiff.

1 Roll. Abr. 85, *Bishop v. Fitzherbert*.

In an action upon the case, the plaintiff declared that the defendant published these words of him, being a justice of the peace, *He for malice and spleen did many times wrest the law and pervert justice to serve his own turn*. It was objected, in order to arrest judgment, that it doth not with sufficient certainty appear, that the words were published of the plaintiff; it not being averred that at the time of publishing them there was a *colloquium* concerning him. Judgment was given for the plaintiff; and by the court—It is the usual course, and sufficient to aver that the words were published of the plaintiff. The judgment was affirmed upon a writ of error.

Cro. Ja. 241, *Beaumont v. Hastings*.

If these words are published in a *colloquium* concerning J S, *Mr. Deceiver has deceived the king*, J S may maintain an action, if it be averred, that at the time of publishing the words there was such *colloquium*; and that he was, at that time, of the king's receivers; although it be not averred, that at the time of publishing the words there was a *colloquium* concerning his office of receiver; for, as it is averred that at the time of publishing the words he was one of the king's receivers, it shall be intended, that they were published concerning his office of receiver.

Cro. Ja. 557, *Fleetwood v. Curle*; 1 Roll. Abr. 57.

As the cases are not reconcilable as to the point, whether an action lies for publishing disgraceful words of a tradesman concerning his trade, unless it be averred that at the time of publishing the words the plaintiff did exercise the trade, it will be proper to mention the principal cases upon the point.

In one case it was holden to be sufficient for the plaintiff in such actions to aver, *Quod fuit mercator, per magnum tempus*.

Cro. Eliz. 273, *Jordan v. Lister*, Pasch. 34 Eliz.

In another case, wherein the plaintiff in such action declared, *Quod per multos annos jam retroactos fuit mercator*, the court doubted, whether, as it is not precisely alleged, it should be intended from the words, *Per multos annos jam retroactos fuit mercator*, that the plaintiff was a merchant at the time of publishing the words.

Cro. Eliz. 794, *Dotter v. Ford*, Trin. 42 Eliz.

In another case, wherein the plaintiff in such action declared that, for five years preceding the first day of May, he had exercised the trade of a draper, judgment was given for the plaintiff. It was objected upon a writ of error, that the declaration is not good; because it is not precisely alleged, that at the time of publishing the words the plaintiff was a draper. The

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judgment was affirmed; and the court agreed that the following distinction taken by Yelverton was well founded; namely, that if an action be brought by a person in an office which he holds during the king's pleasure, for words which are disgraceful to him in his office, it must be expressly alleged that the plaintiff was in the office at the time the words were published; but that, if an action be brought by a person of a profession or trade, for words which are a disgrace to him in his profession or trade, it is sufficient to aver that he has for some years past exercised the profession or trade; for it shall not be intended that he has discontinued his profession or trade.

Yelv. 159, Tuthill v. Milton, Trin. 7 Jac.; Cro. Ja. 222, S. C.

In the last case, the case of Gardener v. Hopwood, Trin. 38 Eliz., was cited, in which it was holden to be sufficient for a plaintiff in such action to aver in his declaration, *Quod per multos annos jam retroactos artem merchandizandi exercuit*.

In another case, wherein the plaintiff in such action declared, *Quod per magnum tempus usus fuit* the art of a drover; the declaration was holden to be bad; because it is not averred, that at the time of publishing the words the plaintiff was a drover.

Cro. Car. 282, Collins v. Malin, Mich. 8 Car. 1; Jon. 304, S. C.

In another case, wherein the plaintiff in such action declared that he had been a merchant for the space of twenty years, without adding the words, *last past*; the declaration was holden to be good; and by the court—It shall be intended, notwithstanding there are opinions to the contrary, that the plaintiff continued to be a merchant.

Sid. 425, Drake v. Hill, Mich. 21 Car. 2.

It is in the general true, that an action does not lie for publishing disgraceful words of a tradesman concerning his trade, unless it be averred, that at the time of publishing the words there was a *colloquium* concerning his trade.

Salk. 694; 2 Saund. 307; Latch. 114; 1 Lev. 113, 250; 2 Lev. 62; Stra. 696, 1169; Ld. Raym. 1417. ¶ In a declaration for slander of an attorney, there must be a *colloquium* concerning the profession of the plaintiff. Gilbert v. Field, 3 Caines, 329.

But, if it appear from the words published of a tradesman, that they were published concerning his trade, it is not necessary to aver, that at the time of publishing them there was a *colloquium* concerning his trade.

1 Lev. 115, 250; 2 Lev. 62; 5 Mod. 398; Stra. 696; Ld. Raym. 1417.

¶ In slander for words charging the plaintiff with having burnt his own barn, with intent to defraud an insurance company, it is not requisite to aver that the barn was insured, where the natural import of the words spoken is to impute the crime of arson.

Case v. Buckley, 15 Wend. 327.

¶ The declaration alleged that the plaintiff, at the time of speaking the words, was of *two trades*, and the defendant intending to injure him in his several trades aforesaid, and to prevent persons from employing him in his said trades, in a certain discourse which he had of and concerning the plaintiff in *one* of his trades, spoke, &c. The plaintiff recovered on proof that he was of that trade concerning which the words were spoken, though he could not prove the allegation that he was of two trades.

Figgins v. Coxwell, 3 Maul. & S. 369; and see 1 Maul. & S. 287.

But, if the plaintiff had stated that the discourse was of and concerning

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both the trades, and with an innuendo that plaintiff in both trades, &c., &c., he would have been compelled to prove that he was of both trades.

Sellars v. Till, 4 Barn. & C. 655.||

If these words are published of a tradesman, *Have a care of him, do not deal with him, he is a cheat, he has cheated all the farmers at E, and now he has come to cheat at F*, an action lies; although it be not averred, that, at the time of publishing them, there was a *colloquium* concerning his trade; it being apparent from the words, that they were published concerning his trade.

2 Lev. 62, Reeve v. Holgate.

If three men have given evidence at a trial, and J S say to them, *One of you three is perjured*, no action lies; for there is in these words such a total want of certainty that it cannot be cured by any averment.

1 Roll. Abr. 81, Brown's case.

But if, in a conversation concerning six defendants to a bill in Chancery, it be said by J S, *These defendants are those who helped to murder J N*, every defendant may maintain an action, if it be averred, that at the time of speaking the words there was such *colloquium*, and that he was one of the defendants.

1 Roll. Abr. 85, Foxcroft v. Lacy.

No action lies for saying to J N, *You are as bad as your wife, when she stole my cushion*; unless it be averred, that the felony alluded to was committed.

Cro. Ja. 331, Radcliffe v. Michael.

So, no action lies for saying to J S, *You are as great a rogue as J N, who stole quilts*, except it be averred that J N did steal quilts.

Com. 267, Upton v. Pinfold.

It has been holden, that no action lies for publishing these words of J S, *He is as arrant a thief as any in England*, unless it be averred that there is a thief in England.

Cro. Ja. 687, Foster v. Browning; Hutt. 73. ¶ To charge the plaintiff with having committed a crime in another state, is actionable, although he would not be amenable to the laws of the state where it was spoken. Van Aukin v. Westfall, 14 Johns. 233.¶

But this case does not seem to be law; for it is laid down in another case, that if these words are spoken to J N, *As sure as God governs the world, or King James this kingdom, you are a thief*, an action lies; although it be not averred that God governs the world, or King James this kingdom; because a thing so apparent as either of these is need not be averred.

Sid. 53, Dacy v. Clinch.

If J N have published these words, *J S says I am a perjured rogue, he is a perjured rogue as well as I*, J S may maintain an action, without averring that the defendant is a perjured rogue; for the words, *as well as I*, amount to a confession of his being so.

1 Lev. 65, Orton v. Fuller.

If these words are published of J N, *He robbed the Hockley butcher*, there is no necessity to aver in the declaration, in an action brought by J N, that there was a Hockley butcher; for the words themselves imply that there was.

Comb. 247, Smith v. Williams; ||and see 1 Lev. 280.||

[In an action for these words, *Mr. Purdy gave 200l. for his warrant to*

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be purser of the Magnanime, (a man-of-war,) judgment was arrested, because the charge as laid was so loose, that it did not of itself import a crime; there was nothing to show *to whom* the money was given; and as it was not averred, the court could not intend it.

Purdy v. Stacy, 5 Burr. 2699.]

It is not necessary to aver what the meaning of words published in a foreign language is in English; it being the duty of the judge, before whom the cause is tried, to inform himself of this from those who understand it.

Hob. 126, Anon. ||It is usual to set out a translation of the words; but a *translation*, without the original, is insufficient. Zenobio v. Axtell, 6 Term R. 162.||

It is not necessary to ascertain the meaning of such English words as have a local signification, by an averment; for it is to be presumed that the judge before whom the cause is tried does understand the meaning of such English words, and if he do not, it may be learnt from the witnesses.

1 Roll. Abr. 86, pl. 1.

§ Plaintiff's declaration alleged that in consequence of the speaking of the words, he became dejected in mind and feeble in body, so as to be prevented from attending to his ordinary business: Held, upon demurrer, to be a sufficient averment of special damages to support the action.

Bradt v. Towsley, 13 Wend. 253.

In slander, a declaration is good which sets out the substance of the words spoken merely: as a charge of stealing.

Nye v. Otis, Mass. 122; Whiting v. Smith, 13 Pick. 364; Pond v. Hartwell, 17 Pick. 269; Allens v. Perkins, 17 Pick. 369.

The omission of the averment that the slanderous words were spoken of and concerning the plaintiff, is fatal to a count.

Sayre v. Jewett, 12 Wend. 135.

A declaration which alleges that the defendant accused the plaintiff of swearing falsely in a certain action properly described as pending before a court of competent authority, is good, because it imports a charge of perjury.

Stone v. Clark, 21 Pick. 51.

When words themselves are set out, which are actionable only in relation to some extrinsic fact, it is requisite to state that fact by way of inducement, and then aver distinctly that the discourse was of and concerning that fact.

Fowle v. Robbins, 12 Mass. 498; Bloss v. Tobey, 2 Pick. 320; 13 Pick. 198; 15 Pick. 321.⁹

3. In what Cases a *Colloquium* is necessary.

A *colloquium* is a conversation which was had at the time of uttering the words for which an action is brought.

It is in the general true, that an action does not lie for words, on account of their being disgraceful to a person in his office, profession, or trade; unless it be averred, that at the time of publishing the words there was a *colloquium* concerning the office, profession, or trade of the plaintiff.

β The omission of a *colloquium*, showing to what the words spoken referred, so as to render them actionable, is fatal. Blair v. Sharp, Breese, 11.⁹

In an action upon the case, the plaintiff declared that he was a draper, and that he gained his living by buying and selling cloths and other goods;

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and that the defendant, intending to slander the plaintiff in his good name and credit, spoke these words to him, *You are a cheating fellow, and keep a false book; and I will prove it.* It was objected, in order to arrest the judgment, that it is not averred, that at the time of speaking the words there was a *colloquium* concerning the plaintiff, or concerning his dealing by way of buying and selling, and, consequently, that the words are not disgraceful to him in his trade. Judgment was arrested.

2 Saund. 307, Todd v. Hastings. β Where there were several counts in the declaration, and the words laid in one of the counts were, "he (meaning the plaintiff) had the money, (meaning the money that had been stolen,) for he (meaning the plaintiff) hunted for it, and was seen there where the money was deposited." Held, that these words were not actionable without a *colloquium*; but as to the count immediately preceding, and to which there was a distinct reference, there was a *colloquium*; this helped the count and made it good. Shultz v. Chambers, 8 Watts, 300. See Thompson v. Lusk, 2 Watts, 17; Maxwell v. Allison, 11 Serg. & R. 343; Brittain v. Allen, 2 Dev. 120; Watts v. Greenlee, 2 Dev. 115.

In an action upon the case, the plaintiff declared, that he was a trader; and that the defendant spoke these words to him, *You are a cheat, and have been a cheat for divers years.* Upon the first motion in an arrest of judgment, Holt, Ch. J., was of opinion that as the words must be understood of the plaintiff's way of living, it was not necessary to aver, that at the time of publishing them there was a *colloquium* concerning the trade of the plaintiff; but he afterwards changed his opinion, and judgment was arrested.

Salk. 694; 5 Mod. 398, S. C.

It was holden that an action did not lie for speaking these words to the plaintiff, *You cheated the lawyer of his linen, and stood bawd to your daughter to make it up with him: you cheat everybody; you cheated me of a sheet; you cheated Mr. Saunders, and I will let him know it;* because it is not averred, that at the time of publishing the words there was a *colloquium* concerning the trade of the plaintiff.

Stra. 1169, Davis v. Miller.

In an action upon the case, the plaintiff declared, that the defendant spoke these words to him, *You are a cheating old rogue, and have cheated the fatherless and widow.* Judgment was arrested, because it is not averred, that at the time of publishing the words there was a *colloquium* concerning the trade of the plaintiff.

Ld. Raym. 1417, Ludwell v. Hole.

|| Wherever the slanderous words refer to some extrinsic matter *material* to the slander, it is necessary to aver a *colloquium* of and concerning that matter; and the want of such averment is not aided by an innuendo explaining the words as referring to such matter. Thus, where the plaintiff declared that he had put in his answer on oath to a bill filed against him in the Court of Exchequer by defendant; and that the defendant, in a discourse with R W, the plaintiff's servant, falsely, &c., spoke of and concerning the plaintiff (without saying "and of and concerning the said answer") certain words, &c. &c.; and then added an innuendo, (meaning that the plaintiff had perjured himself in what he had sworn in his aforesaid answer, &c.,) the court arrested the judgment, on the ground that the innuendo could not enlarge the sense of the words, so as to supply the place of a *colloquium* connecting the words with the answer sworn.

Hawkes v. Hawkey, 8 East, 427; and see 4 Maul. & S. 164; 1 Will. Saund. 243 a, b.

But, where the new matter introduced by the innuendo is *not material* to

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the action, then the want of averment of a *colloquium* of and concerning such matter will not prejudice, since the innuendo may be rejected as surplusage.

Roberts v. Camden, 9 East, 93.¶

If an action be brought for words, on account of their being disgraceful to a person in his office, profession, or trade, and it appear *from the words themselves* that they are disgraceful to the plaintiff in his office, profession, or trade, the action lies; although it be not averred, that at the time of publishing the words there was a *colloquium* concerning the office, profession, or trade of the plaintiff.

In an action upon the case the plaintiff declared, that the defendant published these words of him, being a justice of the peace, *He is a forsworn justice, and not fit to sit upon the bench.* Upon a motion in arrest of judgment it was said, that it is not averred, that at the time of publishing the words there was a *colloquium* concerning the office of the plaintiff as a justice of the peace. Judgment was given for the plaintiff; and by the court—Such averment is not necessary; it appearing from the words themselves, that they were published concerning his office as a justice of the peace.

1 Lev. 280, Carne v. Osgood.

An action lies for publishing these words of a doctor of physic, *He is no scholar*; although it be not averred, that at the time of publishing the words there was a *colloquium* concerning his profession; because no man can be a good physician unless he be a scholar.

1 Roll. Abr. 54, Cawdry v. Chickley; Cro. Car. 270, S. C.

If these words are published of a tradesman, *Have a care of him, and do not deal with him; he is a cheat, and will cheat you; he has cheated all the farmers at Epping, and now he is come to cheat Hatfield,* an action lies; although it be not averred, that at the time of publishing the words there was a *colloquium* concerning the plaintiff; it being apparent from the words themselves that they were published concerning his trade.

2 Lev. 62, Reeve v. Holgate.

In an action upon the case the plaintiff declared, that he is a brewer, and has always paid his debts to the full, without any compounding; and that the defendant, intending to bring the plaintiff into discredit, published the following words of him, *He is a sorry pitiful fellow, and a rogue; he compounded his debts at five shillings in the pound.* Upon a demurrer it was argued that the words are not actionable, because it is not averred, that at the time of publishing them there was a *colloquium* concerning the trade of the plaintiff. Judgment was given for the plaintiff; and by the court—As the publishing of such words of a tradesman must greatly lessen his credit, they must be very prejudicial to him.

Ld. Raym. 1480, Stanton v. Smith.

4. What is the use of an Innuendo.

Nothing which would otherwise remain uncertain can be reduced to certainty by an innuendo; for the word innuendo, which means the same as the word *aforesaid*, can only refer to something that is before certain.

4 Rep. 17, James v. Rutlech. Vide Cowp. 684. β When words will bear several meanings, the plaintiff has a right, by an innuendo, to aver the meaning with which he conceives they were spoken. Bornman v. Boyer, 3 Binn. 517; Shaffer v. Kintzer, 1 Binn. 542; M'Clurg v. Ross, 5 Binn. 218; Shultz v. Chambers, 8 Watts, 300;

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M'Kennon v. Greer, 2 Watts, 353; Beirer v. Bushfield, 1 Watts, 23; Brittain v. Allen, 3 Dev. 167. See as to the office of an innuendo, Goodrich v. Woolcott, 3 Cowen, 231.g

No issue can be joined upon the truth of words which are contained under an innuendo; because such words are never an express averment.

Cro. Car. 443, Slocomb's case.

If it be averred in the declaration in an action upon the case, that the defendant published these words, *One of the servants of J S, innuendo J N, a servant of J S, is a thief*, the action does not lie; for, as it is not averred, that the words were published of J N, or that there was, at the time of publishing them, a *colloquium* concerning him, it shall not be collected from the innuendo, that he was the person intended by the publisher.

4 Rep. 17.

If it be averred in the declaration in an action upon the case, that the defendant published these words of J N, *He did burn my barn, innuendo a barn with corn in it*, the action does not lie; because the words, *He did burn my barn*, are not actionable: it not being felony to burn a barn which has no corn in it, unless it be parcel of a mansion-house, and what is contained under the innuendo shall not make them so.

Rep. 204, Barham's case; 1 Roll. Abr. 82, pl. 1.

An action would, perhaps, at this day lie, for words which import a charge of having burned a barn, although the burning be not felony; (a) but be that as it may, this case applies strongly to the point for which it is adduced; namely, that as the barn does not appear, without the help of the innuendo, to have been a barn with corn in it, it shall not be from thence collected that it was such barn.

||(a) To set fire to a barn with intent to injure any person is now a capital felony. 7 & 8 G. 4, c. 30, § 2.||

||So where the plaintiff averred that he had in due manner put in his answer on oath to a bill in the Exchequer at suit of defendant, but did not aver any *colloquium* respecting that answer, and then alleged that defendant said *he was forsworn*, innuendo that plaintiff had perjured himself in his aforesaid answer to the bill filed against him, it was held that this innuendo could not, without a *colloquium*, enlarge the sense of the words, by referring them to the answer.

Hawkes v. Hawkey, 8 East, 427; and see 4 Maul. & S. 164; 1 Saund. 243 a, b.||

If it be averred in the declaration in an action upon the case, that the defendant published these words of J S, *He hath forsworn himself, innuendo before the justice of assize*, the action does not lie; inasmuch as it does not appear, without the help of the innuendo, that the publisher intended a forswearing before the justice of assize.

1 Roll. Abr. 82, pl. 1.

But if it be averred in the declaration in an action upon the case, that the defendant spoke these words to the plaintiff, *Thou, innuendo the plaintiff, art a thief*, the action lies; because it appears plainly, and without the help of the innuendo, that the plaintiff was the person intended by the speaker.

1 Roll. Abr. 73; Burgess v. Reeves, 4 Rep. 17.

It has been holden, that an action lies for publishing these words of the plaintiff, *He was perjured in his answer in the Star-chamber*, innuendo,

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in a certain bill exhibited there by the plaintiff; although it be impossible, as such bill was never exhibited upon oath, that J S could be perjured in exhibiting it; and by the court—As the words are actionable, without the help of the innuendo, that is void, and ought not to be regarded. [(a) For the office of an innuendo is to explain matter sufficiently expressed before; but the innuendo in this case is not an *explanation* of what was said before, but an *addition* to it.

Cro. Eliz. 609, Corbett v. Hill; 1 Roll. Abr. 83. (a) Cowp. 684. ||Where the effect and office of an innuendo are explained at large by De Grey, C. J.||

The plaintiff declared, that on a *colloquium* concerning the *death* of one D D, the defendant said to the plaintiff, *You are a bad man, and I am thoroughly convinced that you are guilty* (meaning of the murder of the said D D). It was objected, that the innuendo of *murder* is overstrained, there being no *colloquium* laid of *murder*, but only of *death*. But by the court—The innuendo of *murder* is warranted, though the *colloquium* is said to be of *death*. *Death* is the genus, and murder the species. When the conversation was of the death of D, and the defendant says the plaintiff is *guilty* of it, he must mean such a species of death as would infer guilt. Murder is such a species. It is not therefore contradictory, but explanatory; not introductory of new matter, but ascertaining the meaning of the old; and limiting the general word *death* to one particular species of it, *murder*.

Oldham v. Peeke, 2 Bl. Rep. 959.]

||The plaintiff must prove that the slanderous words apply to him in the mode which he marks out in his innuendo. Thus where the plaintiff declared that he was treasurer and collector of tolls, and that defendant spoke of and concerning plaintiff, as treasurer and collector, certain words, “thereby meaning that plaintiff, *as treasurer and collector*, had been guilty of,” &c., it was held that the plaintiff was bound by his innuendo to prove that he was *both* treasurer and collector.

Sellers v. Till, 4 Barn. & C. 655.

So where words may be considered to impute either felony or fraud, and to be actionable in either sense, yet if the plaintiff, by his innuendo, charge that they impute felony, he cannot recover without establishing this by his evidence.

Smith v. Carey, 3 Camp. 460.

But though the *colloquium* be “of and concerning” a man in a particular profession or character, yet unless the innuendo explain the words as applying to him in that character, he may recover, although he do not prove the particular profession or character, provided the words are actionable without reference to the character.

Lewis v. Walter, 3 Barn. & C. 138.||

5. What may be pleaded in Justification of Words.

If an action be brought for calling the plaintiff *thief*, the defendant may plead in his justification, that the plaintiff has been guilty of a certain theft.

1 Roll. Abr. 87, Cuddington v. Williams.

If the words, for the publication of which an action is brought, be, *J S is*
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a perjured man, the defendant may plead in his justification, that J S was perjured in a certain cause.

Bro. *Action of the Case*, 104.

β To an action of slander, where the defendant was charged with saying the plaintiff "took a false oath," the defendant pleaded the general issue, and also, in justification, that the words were true; held, that the jury had the right under the general issue to consider, whether the evidence tending to prove the special plea showed that the words did not impute perjury from their relating to the testimony of the plaintiff, on immaterial points.

Sibley v. Marsh, 7 Pick. 38.γ

It is said to have been agreed by the court in an action for a libel, that where slanderous words are in writing, the truth of the charge thereby imported can no more be justified in an action upon the case, than in a criminal prosecution. But no other case is to be met with wherein the doctrine of this case is adhered to.

Rex v. Roberts, Mich. 3 G. 2. ¶ This was said by Lord Hardwicke, but Holt, C. J., had many years before laid it down that the defendant might plead the truth in an action, though not in an indictment. 11 Mod. 99; 3 Salk. 225, which is settled law. See Vol. vi. p. 351, tit. *Libel*, (A).||

In an action for publishing these words of the plaintiff, *He is a thief*, the defendant pleaded, that the plaintiff had been guilty of stealing something. The plaintiff replied, that after the felony, and before the publication of the words, he had been pardoned by a general pardon. Upon a demurrer, this replication was holden to be good; inasmuch as the guilt, as well as punishment, is taken away by the pardon. It was likewise holden, that it makes no difference in such case, whether it was a general pardon, or a special pardon, of which the defendant might have been ignorant; for that every person who publishes slanderous words does it at his peril.

Hob. 81, Cuddington v. Wilkins.

If the plaintiff reply to a plea of justification, a general pardon, it is incumbent upon him to show that he is not within any of the exceptions therein contained.

Raym. 23, Harris's case.

In an action for publishing these words of the plaintiff, *He stole plate out of my chamber*, the defendant pleaded, that he had lost plate out of his chamber; and that, suspecting the plaintiff to have stolen it, he did publish the words. The plea was upon a demurrer holden to be bad; and by the court—Suspicion is not a sufficient justification for the publication of slanderous words.

Cro. Car. 52, Powell v. Plunket.

Common fame will justify the arresting of a person upon suspicion of having committed a felony, and the charging of him in a judicial way with having been guilty thereof: but common fame is not a justification for such charge in an extrajudicial way.

Roll. Abr. 43, Busy v. Child; Hob. 82; Cro. Eliz. 248; Hutt. 13.

The precise words, and all of them, for the publication of which the action is brought, must be confessed and justified by the defendant's plea, otherwise his justification is bad.

4 Rep. 13, 14. β See Nall v. Hill, Peck's Rep. 325.γ

If an action be brought for publishing these words of the plaintiff, *He is*

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a traitor, it is not sufficient for the defendant to plead, that he only published these words, *Such things traitors do*.

Cro. Eliz. 153, Billingham v. Minors; 1 Roll. Abr. 83. ¶In such case the defendant should plead not guilty, and take advantage of the variance between the words spoken and those set out.¶

If the plaintiff in an action upon the case declare, that whereas she was of good fame and reputation, the defendant published these words of her, *She is a common whore*, and the defendant plead, that at the time of publishing the words the plaintiff was not of good fame or reputation, the plea is bad; inasmuch as it is no answer to the words, and only goes to what is alleged by way of inducement, which required no answer.

Styles, 118, Strachy's case.

If it be averred in the declaration in an action upon the case, that the defendant published certain words of the plaintiff, it is not a good justification for the defendant to plead, that he heard another publish the words, *quæ est eadem*: for it can never be the same thing, to publish words and to hear them published.

2 Roll. Rep. 284, Scarlet v. Jennings.

[But, if the person repeating the slander at the same time mention the name of the person from whom he heard it, that may be pleaded in justification to an action brought against the former.

Davis v. Lewis, 7 Term R. 17;] {12 Rep. 133, 4, Lord Northampton's case; 2 East, 426, Maitland v. Goldney; 5 East, 463, Woolnoth v. Meadows.—And even if the name of the person from whom he heard it was not mentioned at the time, the defendant may, in mitigation of damages, show that the slander was communicated to him by a third person. 1 Binn. 85, Kennedy v. Gregory; Ibid. 90, n., Morris v. Duane. Vide 2 Bos. & Pul. 224, Watson v. Christie, and the cases cited in p. 225, n.} ¶But it is doubtful whether this is a justification at all; and certainly not, unless the words are repeated without malice, and on a fair and just reason. 3 Barn. & A. 615; 3 Barn. & C. 24.¶

If it be averred in the declaration in an action upon the case, that the defendant published these words of the plaintiff, *He is a thief, and hath stolen 20l.*, and the defendant plead, that the plaintiff did steal two pullets, this is not a good justification; it being no answer to the words.

2 Roll. Rep. 214, Merce v. Hilsden. β A plea of justification in slander is bad, unless it distinctly admits the speaking of the words. Davis v. Matthews, 2 Ohio, 257. See Swann v. Rary, 3 Blackf. 299.γ

In an action for speaking these words to the plaintiff, *Thou hast played the thief, for thou hast stolen my cloth and half a yard of velvet*, the defendant justified the speaking of these words, *Thou hast stolen part of the velvet delivered to you*. The justification was holden to be bad, because it only goes to part of the words.

Cro. Eliz. 239, Johns v. Gittings.

If the words, for publishing of which an action is brought, charge a tradesman with having been a bankrupt upon the first day of April, 17 Jac. and the defendant plead, that the plaintiff was a bankrupt upon the first day of April, 15 Jac., and that therefore he published the words, the plea is bad: because it is not averred that the plaintiff continued a bankrupt to the time of publishing the words; for he might afterwards recover his credit in trade.

Cro. Ja. 578, Upsheer v. Betts.

If any other words were published at the time the words which are contained in the plaintiff's declaration were published, or if any circumstance

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attend the publication of those words which would render them not actionable, the defendant may in his plea avail him thereof.

4 Rep. 13, 14, 19; Cro. Car. 510.

In an action for speaking these words to the plaintiff, *You are a murderer*, the defendant pleaded, that, in a conversation with the plaintiff concerning poaching, the plaintiff confessed he had killed a great number of hares; and that thereupon he said to him, *You are a murderer*, innuendo *a murderer of hares*. The plea was holden to be good; and by the court—As this plea doth confess and justify the words, it would be unreasonable to confine the defendant to the general issue.

4 Rep. 13, 14, Cromwell's case.

The publication of slanderous words, for which an action would in the general lie, may in certain cases be justified, although the words are false.

The publication of words which import the charge of a crime may, notwithstanding the falsity of them, be justified, if they have been only published in a course of justice.

Cro. Eliz. 230, 248; Hob. 82; Hutt. 113; 1 Roll. Abr. 43; 4 Co. 14 b, 15 a.

A barrister may justify the speaking of slanderous words in pleading his client's cause, although the words are false; it being his duty to speak for his client; and it being likewise in a course of justice.

Cro. Ja. 90; 1 Roll. Abr. 87; Styles, 462. || Provided the words are not irrelevant to the matter in issue. See 1 Barn. & A. 232; 4 Barn. & C. 473.||

A witness may justify the speaking of slanderous words, in giving his evidence, which are false, this being in a course of justice.

Cro. Eliz. 230, Buckley v. Wood.

A complaint having been made by the plaintiff against the defendant in the Court of King's Bench, he exhibited an affidavit, wherein he charged the plaintiff with having sworn falsely against him. An action being thereupon brought, the defendant pleaded in his justification, that the words suggested to be libellous were contained in an affidavit made in his defence, against the complaint in this court, and in answer to an affidavit made by the plaintiff. The question upon a demurrer to this plea was, whether it were a good plea? All the justices were clearly of opinion that it was; and by Lord Mansfield, Ch. J.—If the denying in one affidavit of what is sworn in another should be deemed a libel, actions for libels would be endless; for an action might be brought in every case wherein there are contradictory affidavits. Witnesses must be at liberty to contradict each other; nor is there any necessity for an action in such case; for if slanderous words, which are immaterial, are contained in an affidavit, the court has power to do complete justice to the party injured, not only by ordering a satisfaction to be made, but likewise by ordering the slanderous words to be expunged.

MS. Rep., Astley v. Young, Trin. 32 G. 2, in K. B.; [2 Burr. 807, S. C.]

If a preacher, without an intent to slander, recite a slanderous story in his sermon, which is false, the doing of this may be justified.

Cro. Ja. 91, Greenwood's case; 1 Roll. Abr. 87.

Heretofore the truth of the charge imported by the words, for the publication of which an action was brought, was allowed to be given in evidence, in mitigation of damages, upon the plea of not guilty: but at a

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meeting of all the judges it was agreed, not to allow this to be done for the time to come ; because, unless the truth of the charge imported by the words is pleaded in justification, the plaintiff cannot come prepared to show the falsity thereof.

Stra. 1200, *Underwood v. Parks* ; { *Willes*, 20, *Smith v. Richardson*, 2 Bos. & Pul. 224, 225, n. } [It was holden prior to this case, that where the charge is of a particular and specified criminal act not capital, the defendant may give the truth of it in evidence [in mitigation.] *Smithies v. Harrison*, per Holt, C. J., 1 Ld. Raym. 727. However, where the words charged impute a capital crime, if the plaintiff gives evidence of *other expressions* {¹} to the same purpose in aggravation, the defendant may, in mitigation, give evidence that *these last* are true, for he had no opportunity to plead it. *Collison v. Loder*, Oxon, 1750, per Burnet, J., Bull. N. P. 10.] || And this is so in all cases of slander, not merely where words impute a capital crime, as above stated. *Warne v. Chadwell*, 2 Stark. Ca. 457. That the truth of the words *charged* cannot be given in evidence in mitigation of damages, has been settled law since the case in the text ; and see *Willes*, R. 20, B. N. P. 9 ; *anté*, Vol. vi. p. 351, tit. *Libel*, (A). || {¹} Vide *Peake*, N. P. 22, *Charlter v. Barrett* ; *Ibid.* 125, *Mead v. Daubigny* ; *Ibid.* 166, *Lee v. Huson* ; 3 Esp. Rep. 133, *Cooke v. Field*. }

β If the general issue, and also the truth in justification, are pleaded to an action of slander, the plaintiff is not required to prove the speaking of the words on the trial of the general issue.

Jackson v. Stetson, 15 Mass. 48 ; *Alderman v. French*, 1 Pick. 1.

The plea of justification, if untrue, is an aggravation of the slander, and is evidence of continued malice.

Wilson v. Nations, 5 Yerg. 111.γ

(T) In what Kinds of slanderous Words Spiritual Courts have Jurisdiction.

ALTHOUGH an action upon the case, for the publication of words, does not lie, unless the words are in themselves actionable, or some special damage has been received from them, the party of whom they have been published is not in all other cases without redress ; for, if words amount to a spiritual defamation, a suit may be instituted in a spiritual court.

No words amount to a spiritual defamation ; unless they import a charge of an offence which is conusable in a spiritual court.

Salk. 692, *Coxiter v. Parsons* ; 2 Lev. 49 ; 2 Roll. Abr. 296 ; *Sid.* 393 ; *Salk.* 548 ; *Stra.* 946.

It follows, that if no suit can be instituted in a spiritual court, for the offence of which the words import a charge, none can be instituted for the words.

4 Rep. 20 ; 8 Mod. 115 ; 11 Mod. 140, 208.

A suit may be instituted in a spiritual court for publishing these words of J S, *He is an heretic* ; heresy being punishable in such court.

4 Rep. 17 ; *Cro. Ja.* 787.

It has been holden, that a suit may be instituted in a spiritual court for publishing these words of a clergyman, *He preacheth nothing but lies and malice* ; because the question, whether a clergyman have discharged his duty properly, is fit to be tried in such court.

3 Lev. 17, *Crunden v. Walden*.

In a subsequent case, wherein a suit was instituted in a spiritual court for publishing these words of a clergyman, *He is an impudent, ignorant blockhead ; his spiritual advice is not fit to be followed ; he is not fit to administer the sacrament*, it was said, in showing cause against a rule to show cause why a writ of prohibition should not be awarded, that these

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words reflected upon him in his profession, and the authority of the preceding case was relied upon. A prohibition was awarded; and by Holt, Ch. J.—Although these words do reflect upon a clergyman in his profession, they do not charge him with any thing which is punishable in a spiritual court.

11 Mod. 140, 208; Clarke v. Prince, Salk. 692.

A suit may be instituted in a spiritual court for publishing these words of J S, *He is a pander*; for a pander may be punished in a spiritual court.

2 Roll. Abr. 296, Lewis v. Whitley.

So it may for publishing these words of a woman, *She is a bawd*; because a bawd is punishable in a spiritual court.

Cro. Car. 229, Hollingshead's case; Ibid. 261.

So for publishing these words of J N, *He is an adulterer*; for adultery is punishable in a spiritual court.

1 Freem. 300; 3 Lev. 18.

So for publishing these words of J S, *He is a whoremaster*; fornication being punishable in a spiritual court.

Salk. 692, Smith v. Wood; Cro. Ja. 323; 3 Lev. 350.

It has been holden, that it is not a spiritual defamation to publish these words of a woman, *She is a whore*; for that, unless she be at the same time charged with some act of incontinency, the words are to be considered as words of heat.

Cro. Car. 111; Eaton v. Ayloff, Pasch. 4 Car. Sid. 433.

But in the case of Mellett v. Herbert, which is said to have been determined upon considering all the cases, it is laid down, that a suit may be instituted in a spiritual court for calling a woman *whore*.

Sid. 404, Mellett v. Herbert, H. 20 Car. 2, l.; 1 Ventr. 7.

A few years after, it was again holden, and upon great consideration, after two arguments at the bar, that the publication of these words of a woman, *She is a whore*, is a spiritual defamation; for that such words, which render a woman liable to suffer public penance, ought not to be considered as words of heat.

2 Lev. 63, Betniff v. Popple, Trin. 24 Car. 2; 1 Ventr. 220.

The doctrine of the two last cases having been frequently recognised, it is now settled, that a suit may be instituted in a spiritual court, for calling a woman *whore*.

Salk. 696, Graves v. Blanchett; 3 Lev. 193; Salk. 693.

A suit may be instituted in a spiritual court for any words which are tantamount to the calling of a woman *whore*, as well as for calling her *whore*.

Carth. 498, Plisse v. Smith; Stra. 471, 545, 555.

If these words are published of a married man, *He is a cuckold*, he cannot maintain a suit in a spiritual court, unless his wife join in it; because she only is defamed by the words

2 Lev. 66, Toser v. Davis.

But, if these words have been published of a married man, *He is a wittol*, he may institute a suit in a spiritual court, without his wife joining in it; inasmuch as the words imply his having consented, or at least his having been privy, to the adultery of his wife.

Salk. 692, Smith v. Wood.

(U) Prohibitions to the Spiritual Court.

A wife may institute a suit in a spiritual court, without her husband joining in it, for words which import the charge of her having been guilty of adultery; because she is liable to do penance for this offence.

2 Roll. Abr. 298, *Motam v. Motam*; 10 Mod. 64.

It has been holden, that if A say to B, the son of C, *You are a son of a whore*, the son or mother may either of them institute a suit in a spiritual court.

3 Lev. 119, *Vincent v. Alpy*.

But in another case it was holden, that only the mother can institute a suit in a spiritual court for words published of her son, which are tantamount to calling him *bastard*; because such words are not defamatory to the son.

11 Mod. 113, *Hoskins v. Lee*.

||See Burn's Eccl. Law, tit. *Defamation*, (8th ed. ;) 1 Hagg. R. 463; 2 Hagg. R. 1; 2 Phil. R. 106, 467.||

(U) In what Cases a Prohibition lies to a Suit in a Spiritual Court for Words.

1. *Where actionable Words are coupled with Words which are a spiritual Defamation.*

If words, for which an action would lie, are coupled with words which are a spiritual defamation, and a suit is instituted in a spiritual court for the whole words, a prohibition lies. It would be vexatious to proceed both in a spiritual and in a temporal court; and the injured person, if he means to have satisfaction for the damage sustained, must proceed by an action in a temporal court, the proceedings in a spiritual court being only *pro salute animæ*.

4 Rep. 20, *Palmer v. Thorpe*; F. N. B. 53; Comb. 391; Carth. 213.

If a suit be instituted in a spiritual court for publishing these words of a woman, *She is a pocky whore*, a prohibition lies; for as these words import a charge of her having the *great pox*, as well as being a whore, an action would lie.

12 Mod. 248, *Whitfield v. Powell*.

A prohibition lies to a suit in a spiritual court for publishing these words of a woman, *She is a whore and a thief*; because an action would lie for the word *thief*.

Sid. 404, *Mellet v. Herbert*; 2 Roll. Abr. 295; Ld. Raym. 809.

So, for publishing these words of a woman, *She is a whore and keeps a bawdy-house*, because an action would lie for the latter words.

Salk. 552, *Galizard v. Rigault*.

Although only words which are a spiritual defamation are contained in the libel exhibited in a spiritual court, if it be suggested to a temporal court, having power to award a prohibition, that other words for which an action would lie were coupled with those contained in the libel, a prohibition lies.

2 Roll. Abr. 295, *Butler v. Bartlett*.

2. *Where a Temporal Damage has been received from Words which are a spiritual Defamation.*

If it be suggested to a temporal court, having power to award a prohibition, that a temporal damage has been received from words which are a spiritual defamation, a prohibition lies.

(U) Prohibitions to the Spiritual Court.

A servant to the abbot of St. Albans had, by the direction of his master, prevailed upon a married woman to come to his master's chamber. As soon as the abbot was alone with her, he began to find fault with the meanness of her dress. The woman answered, that her dress was as good as her husband could afford to buy for her. Upon this he told her, well knowing what women set their hearts upon, that if she would submit to his will, she should go as well dressed as any woman in the parish. As she would not comply with the proposal, he, after assaulting her and making an attempt to lie with her by force, which did not succeed, locked her up in his chamber, hoping at another time to accomplish his design. The husband being informed of all which had passed, spoke publicly of the abbot's behaviour to his wife, and threatened to bring an action for the false imprisonment. Hereupon the abbot, intending to add oppression to injury, instituted a suit against the husband, in a spiritual court, for saying he had solicited his wife's chastity. The whole matter being disclosed to a temporal court, having power to award a prohibition, a prohibition was awarded; the court being of opinion, that as the spiritual defamation was coupled with the assault upon and imprisonment of the wife, for which an action would lie, it was not proper that the suit in the spiritual court should proceed.

4 Rep. 20, *Palmer v. Thorpe*.

A prohibition lies to a suit in a spiritual court, for publishing these words of a woman, who has a right to enjoy an estate she is in the possession of so long as she lives chaste, *She is a whore*; for, as she may, by reason thereof, be brought into danger of losing the estate, an action would lie.

Sid. 214, *Boys v. Boys*; 4 Rep. 17; 1 Lev. 134.

If a suit be instituted in a spiritual court for publishing these words of a woman, who lives in London, *She is a whore*, a prohibition lies; because, as, by a custom of that city, a whore is liable to be carted, an action would lie.

1 Roll. Abr. 36, *Hassell v. Cooper*; Comb. 138.

It was formerly holden that a prohibition did not lie to a suit in a spiritual court for publishing words of a woman who lives in London, which import a charge of incontinence; for that only the word *whore* is within the custom.

Lutw. 1039, *Houblon v. Miller*; Cro. Car. 339; Sid. 248.

But it has been since holden, that the word *strumpet* is within the custom, and consequently that a prohibition lies to a suit in a spiritual court, for publishing these words of a woman, who lives in London, *She is a strumpet*.

Stra. 555, *Cooke v. Wingfield*; 8 Mod. 115.

A prohibition lies to a suit in a spiritual court for calling the husband of a woman, who lives in London, *cuckold*; for, as calling him *cuckold* is tantamount to calling her *whore*, the word is within the custom.

Stra. 471, *Vicars v. Worth*; Ibid. 545. β A mother cannot maintain an action of slander for calling her daughter a bastard, there being no *colloquium* of the mother. *Maxwell v. Allison*, 11 Serg. & R. 343. γ

If a suit be instituted in a spiritual court for publishing these words of a clergyman, *He is an heretic*, if by reason thereof he lost a benefice, to which he was about to be presented, a prohibition lies, because an action would lie; the loss of the benefice being a temporal damage.

4 Rep. 17.

(U) Prohibitions to the Spiritual Court.

A prohibition lies to a suit in a spiritual court for publishing these words of a woman, *She had a bastard by J S*, if by reason thereof she lost a marriage with J N, because an action would lie for the loss of the marriage.

1 Roll. Abr. 34, Davis v. Gardiner; 4 Rep. 16; Cro. Ja. 162.

So, to a suit in a spiritual court, for publishing these words of J S, *He is a whoremaster*, if by reason thereof he lost a marriage with A D; for the loss of a marriage is as great a damage to a man as to a woman.

1 Roll. Abr. 35, Matthew v. Cross; Cro. Ja. 323, 422; Latch, 118; Cro. Car. 269.

If a suit have been carried on in a spiritual court for a spiritual defamation, and the defendant, after agreeing to commute the penance to which he has been sentenced by paying a sum of money to the party defamed, refuse to pay the money, a prohibition does not lie to a suit in that court for compelling him to pay it.

4 Rep. 21.

3. *Where the Words, which are a spiritual Defamation, import a Charge of an Offence not conusable in a Spiritual Court.*

As only words, which import the charge of an offence which is conusable in a spiritual court, are a spiritual defamation, a prohibition lies to a suit in a spiritual court for words which do not import such charge. The prohibition is in this case founded upon that general power, which the king's superior temporal courts have, to prohibit all other courts, spiritual as well as temporal, from proceeding in a cause which is not within their jurisdiction.

If a suit be instituted in a spiritual court for publishing these words of a clergyman, *He is a fool, an ass, or a goose*, a prohibition lies; the words being words of heat.

2 Lev. 49, Newman v. Ringerby.

So, if a suit be instituted for publishing these words of a clergyman, *He is a dunce and a blockhead; I wonder the bishop would ordain such a fellow; he deserves to have his gown pulled over his ears*; a prohibition lies: for a clergyman is no more punishable in such court, because he is a *dunce and a blockhead*, than another man. It being said in this case that a clergyman may be deprived of his benefice for want of learning, Rolle, C. J., answered, if that should be the case he must bring an action at law, deprivation of a benefice being a temporal damage.

Salk. 692, Coxiter v. Parsons; 11 Mod. 140, 208.

So, if a suit be instituted for speaking these words to a clergyman, *You are an old rogue and a rascal, and a contemptible fellow, and hated and despised by everybody*, a prohibition lies; the words not being a spiritual defamation.

Stra. 946, Musgrave v. Bovey.

A prohibition lies to a suit in a spiritual court for publishing these words of J S, *He is a knave*; because the being a knave does not make a person liable to any ecclesiastical censure.

Salk. 548, Hawkin's case; 2 Roll. Abr. 206; Sid. 293.

These words, *He is as great a rogue as ever was hanged, and deserves hanging more than Doctor Pims*, were holden to be no spiritual defama-

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tion; and a prohibition was granted to a suit in a spiritual court for publishing them.

11 Mod. 112, Hoskins v. Lee.

A prohibition lies to a suit in a spiritual court for calling a man *drunkard*; drunkenness not being punishable in a spiritual court.

2 Roll. Abr. 296, Haynes v. Poynter.

If a suit be instituted in a spiritual court, for calling a woman *quean*, a prohibition lies; inasmuch as the meaning of the word *quean* is not well ascertained, and it is moreover a word of heat.

2 Roll. Abr. 296, Blackshaw v. Stevens.

SMUGGLING AND CUSTOMS.

SMUGGLING consists in the bringing on shore, or in the carrying from the shore, of goods, wares, or merchandise, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited.

This offence is productive of various mischiefs to society. The public revenue is thereby lessened; the fair trader is injured, and the nation impoverished: rival, and perhaps hostile states are thereby enriched; and the persons guilty thereof, being hardened by a course of disobedience to, and defiance of law, become at last so abandoned and daring as not to hesitate at being guilty of the greatest offences.

It must be the wish, and ought to be the endeavour of every lover of his country, that many of the present high duties should be lowered. This would be very advantageous to trade; and it would, by removing in part the temptation, put some stop to the pernicious practice of smuggling, which all the severe laws made against it have not been found to do. In the mean time, it is not only their duty, but it highly concerns all persons of property, and every friend to peace and order, to co-operate in discountenancing this offence, and in carrying the laws made against it into execution.

Under this title it will be proper to give some account,

(A) Of Customs in the general.

(B) Of the Origin of Customs.

(C) Of the ancient state of certain Customs.

1. *Of the Duties upon Wool, Wool-fells, and Leather.*

2. *Of the Duty of Tonnage.*

3. *Of the Duty of Poundage.*

(D) Of the present State of the Customs.

1. *Of the Duty of Tonnage.*

2. *Of the Duty of Poundage.*

3. *Of the Duties to which Aliens are liable.*

(A) Of Customs in the general.

(E) Of Prohibited Goods.

(F) Of the pecuniary Penalties and Forfeitures incurred by Persons guilty of Smuggling, or of such Practices as have a direct tendency thereto.

1. *In Ships at Sea or hovering upon the Coast.*
2. *In the Shipping or Unshipping of Goods at any Port, Member, or Wharf, not lawfully appointed for such purposes.*
3. *In Ships in Port inward bound.*
4. *In Ships in Port outward bound.*
5. *In Coasting Vessels.*
6. *In the Case of Certificate and Prohibited Goods.*
7. *In divers other Cases.*

(G) Of the corporal Punishments to which Persons who have been guilty of Smuggling, or of such Practices as have a direct tendency thereto, are liable.

1. *Imprisonment.*
2. *Whipping.*
3. *Transportation.*
4. *Death.*

(A) Of Customs in the general.

THE term customs is usually applied to those taxes which are payable upon goods and merchandise imported or exported.

Story, Const. § 949.g

As a part, and the most considerable part of the offence of smuggling consists in the bringing on shore, or in the carrying from the shore, of goods, wares, or merchandise, without paying the customs or duties, which ought to be paid upon the importation or exportation of such goods, wares, or merchandise, it cannot be improper to give some account of the customs in general.

Under the word *customs*, is comprised every duty, which is to be paid upon the importation or exportation of goods, wares, or merchandise.

Duties upon the importation or exportation of goods, wares, or merchandise, were perhaps at first imposed, for enabling the crown to make and maintain commodious ports and harbours, and to keep up a fleet for the protection of the ships of merchants against enemies and pirates. As these services were of a permanent nature, it was reasonable that the duties appropriated for defraying the expense thereof should be so likewise; and it appears from the practice of early times, that this was the case.

The first (a) grant of a custom now extant was made to the king and his heirs; and in the (b) Great Charter, which was antecedent to this grant, mention is made of ancient customs as being due and having been constantly paid. It may likewise be fairly inferred from the fact of their having been paid for a number of years without any new demand of the crown or grant from the people, that the imposition of ancient duties was for a continuance. From the length of time some ancient duties had been paid, in which they differed from such aids as were only paid during the continuance of a particular emergency, they did perhaps obtain the name of customary payments, or *customs*: (c) by which name all duties afterwards imposed upon goods imported or exported have been called.

(a) Rot. Pat. m. 3 E. 1, m. 1, n. 1; Rot. Fin. 3 E. 1, m. 24; 2 Inst. 59. (b) Mag.

(B) Of the Origin of Customs.

Ch. c. 30 ; 51 H. 3, st. 5, § 6. [(c) The customs are denominated in the barbarous Latin of our ancient records, *custuma*; not *consuetudines*, which is the language of our law, whenever it means merely usages. This appellation seems to be derived from the French word *coustume*, or *coltume*, which signifies toll or tribute, and owes its own etymology to the word *coust*, which signifies price, charge, or, as we have adopted it in English, *cost*. 1 Bl. Comm. 324.] || But the customs were called *custumæ* and *consuetudines* indiscriminately. *Magna Charta* provides that merchants shall have safe conduct *per antiquas et rectas consuetudines*; and Lord Coke expressly gives the word this meaning, 2 Inst. 58, which it bears in many old letters patent and records. Vide Madd. Exchequer, chap. 18.||

(B) Of the Origin of Customs.

¶ THE power of congress to levy and collect taxes, duties, imposts, and excises, is co-extensive with the United States.

Loughborough v. Blake, 5 Wheat. 317.8

It has been a much altercated question, whether the right of imposing customs was heretofore in the crown alone, or whether it was always in parliament.

The maintainers of the former opinion distinguish between subsidies and customs. They admit, that the former were always assessed in parliament: but it is insisted that the king alone had heretofore a right to impose customs, in consideration of the license given by him, to export or import the commodities upon which they are imposed; of the interest he has in the sea, as being guardian thereof, and maintainer of its ports and harbours; and of the protection given by his ships to the ships of merchants against enemies and pirates.

Dyer 43 b, 165 b; Dav. 9 a, b; ||30 Hen. 8.||

The following authorities have been likewise relied upon, in support of this opinion.

A patent for life having been granted by Edw. VI. to a merchant alien, for the importing and exporting of goods to a certain value, paying to the king his heirs and successors so much as an English merchant ought to pay, it was the opinion of all the justices in the Exchequer Chamber, that the patent continued to be valid after the king's death for the old customs wherein he had an inheritance by his prerogative; and that it was only void as to the subsidy upon goods, which by a statute of tonnage and poundage had been granted to him for life only.

Dyer, 92 a, Mich. 1 Mar.

A judgment was given in the Court of Exchequer, in an information against German Ciol, for a duty of forty shillings per ton, imposed by Queen Mary upon all wines of the growth of France brought into this realm.

2 Inst. 62, Pasch. 1 Eliz.

|| Lord Coke observes on this case that a proclamation prohibiting importation of wines on pain of forfeiture was against law; for it appeared not that any war was between the realms, and that the proclamation was made on purpose to set an imposition, so that the proclamation was the ground of the information.

2 Inst. 63.

And in the next page but one preceding of the second Institute is stated a case of an information by the Attorney-general in the Exchequer, (which appears to have been decided in the term following the above decision,)

(B) Of the Origin of Customs.

against some merchant-strangers for landing Malmsey wines at another port than Southampton, contrary to letters-patent of Philip and Mary, granting that all such wines should be landed at that port and not elsewhere, under penalty of treble custom to the king and queen; and after argument in the Exchequer, it was resolved by all the judges;—1st, That the grant in restraint of landing the wines was a restraint of the liberty of the subject against law;—2d, That the assessment of treble custom was void.

2 Inst. 61.¶

The executors of Smith, a customer, were charged in an information for money received by their testator, on account of an imposition of three shillings and four pence, set by Queen Elizabeth, under her privy signet, upon every hundred weight of alum made in the pope's dominions; and judgment was given against them.(a)

2 Inst. 63, Mich. 38, 39 Eliz. ¶(a) But Lord Coke says, "The reason of this judgment was, that Smith received the money as due to the queen, and the issue joined was *quod prædicti executores non tenebantur ad computum, &c.*, and the validity of the imposition was never questioned." 2 Inst. 63.¶

In an information against John Bates, for a duty imposed by the crown upon currants imported, judgment was given for the king.(b)

2 Inst. 62, Pasch. 4 Jac. ¶(b) This is the great case of "impositions" reported in Sta. Tri. xi. 29, vol. ii. 371, (8vo ed.) Lord Coke remarks on it, that the common opinion was that the judgment was against law and divers express acts of parliament. 2 Inst. 63. In a note of this case, in Dyer, 165, the decision is supported by some curious reasons which hardly add to its weight; viz., that the law in such cases is not to be looked for in books of law, "*mais hors des presidens del Exchequer*;" and that as the duty on wines had been increased by Hen. 8 and Mary, the duty on currants must be lawful, for "*wyne est plus necessary que currants*;" and "*auter reason est*" that such duty "*nest burthen al commonweale mes al delicate mouthes*!" Vide, however abler arguments in favour of the imposition in Sir F. Bacon's speech upon it in the House of Commons; and also Hakewill's and Yelverton's arguments against it, xi. Sta. Tri. 29; and see Lane's Rep. 22; Sir John Davis on Impositions, 131. The discussion of this judgment in parliament was followed by a petition of grievances from the Commons, complaining of this imposition, ecclesiastical commissions, proclamations, and other encroachments of the crown. It was presented by Sir Francis Bacon, 7 July, 1610. Vide the petition, and his elegant and fulsome speech on presenting it, Sta. Tri. xi. 65; vol. ii. 531, (8vo ed.); 2 Bacon's works, 212, (4to ed.)¶

Writs were issued commanding certain ports, towns, cities and counties, respectively, to provide a certain number of ships for his majesty's service, and suits were commenced against divers persons who refused to pay the sums assessed upon them by way of contribution to this service. A *scire facias* being issued against John Hampden, Esq., to show cause why he should not be charged with certain sums assessed upon him, he demurred to the proceeding upon it. After divers solemn arguments in the Exchequer Chamber, it was agreed by the majority of the judges that he ought to pay the sum assessed upon him; and there was judgment against him.

16 Car. 1, c. 14, Hampden's case.

The principal reasons assigned for this judgment were; that, when the whole kingdom is in danger the king may by writs under the great seal command all the subjects of his kingdom to provide and fit out at their own expense such a number of ships, with men, victuals, and provisions, and for such time as he shall think necessary for the safety of the kingdom; that the king may by law, in case of refusal, compel the doing

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thereof; and that the king is the sole judge of the danger and of what is proper to be done to repel it.

¶Vide a full report of this case, and the arguments of the counsel and judges, and the subsequent proceedings in parliament, 3 Sta. Tri. 826, (8vo ed.)¶

It is very proper that merchants should pay customs,—but it by no means follows that they should be imposed at the discretion or arbitrary will of the reigning prince; for, whatever seeming difference there may be, there is no real difference between discretion and arbitrary will.

The king may with as much propriety be called guardian of the land as of the sea: and if so, there is as much reason for his having a right to impose taxes at his pleasure for the defence of the one as of the other. A right to do this would, besides making a parliament in a great measure useless, make all private property insecure; for it would, in case there were such right, depend entirely upon the will of one man, how much of this every other man should be suffered to enjoy.

If the circumstances of the times, when the three former of these judgments were given, are considered, they will be found to have very little weight; and it is notorious that no one thing contributed so much to the troubles which soon after arose, and at length ended in the death of the unfortunate prince then on the throne, as the decision in favour of ship-money did.

Instead, however, of merely defending the contrary opinion, and being contented with repelling the force of these authorities, it is better, in so constitutional a point, to act offensively, and endeavour to show, by authorities of much greater weight, as well as more ancient, that, by the English constitution, the right of imposing customs was originally in parliament.

Before I attempt to do this, I shall take notice of a mistake as to this point of Lord Chief Justice Coke's, by which a very great man seems to have been misled.

After mentioning divers cases in which it had been holden, that certain customs were due at the common law, and not originally imposed in parliament, Vaughan, C. J., adds, "This was in those several reigns, the opinion of all the judges of the times, whence we may learn how fallible even the opinion of all the judges is, when the matter to be resolved must be cleared by searchers not common, and depends not upon things vulgarly known by readers of the Year Books; for since these opinions it is known, that the customs, called the *antiquæ custumæ*, were granted to King Edward the First in the third year of his reign as a new thing, and were not due to the crown at common law."

Vaugh. 161.

He goes on to cite a patent dated in the third year of Edward the First, which runs thus: *Cum prælati, et magnates, et tota communitas mercatorum regni nostri, nobis concesserint quandam novam consuetudinem de lanis, pellibus, et coriis, tam in Anglia quam in Hibernia et Wallia, regnum nostrum exeuntibus, in perpetuum nobis et hæredibus nostris capiendam, sicut in forma inde provisæ et communiter concessa plenius continetur.*

From the date of this patent he observes, that the grant therein alluded to must have been by the statute of first Westminster, because no other statute had been made in the reign of this prince, before the date of the patent. In order to account for the grant's not being now a part of that

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statute, he supposes, that it was annexed to the roll of that statute by way of rider, and was afterwards casually lost from the roll. Having thus ascertained the time of the grant, he concludes that the customs upon wool, wool-fells, and leather, called from their great antiquity *antiquæ custumæ*, were not due at the common law, but were granted by the statute of first Westminster.

By comparing what is said by Vaughan with 2 Inst. 59, it will evidently appear, that the opinion of Vaughan was too hastily formed from Coke's comment upon the grant. It is scarce possible to be otherwise; for a man of Vaughan's sound judgment and acute discernment must, upon the least looking into the matter, have seen that the customs upon wool, wool-fells, and leather, existed long before.(a)

[(a) The compiler of the text would have done well to use a little more caution before he accused Lord Coke and Lord C. J. Vaughan of mistake in laying it down that the customs called *antiqua custuma* on wools, wool-fells, and leather, originated by act of parliament in 3 Edw. 1. And had he been contented to let the right of the Commons to grant customs, as well as other duties, rest on the ground on which Lord Coke and Lord C. J. Vaughan had with reason placed it, the reader might have been spared the five following pages of inconclusive discussion upon a tedious subject. Since the compilation of the text, Lord Hale's curious and excellent treatise concerning the customs has appeared in print; and his lordship there gives at length the very act of Edw. 1, granting the *nova* (afterwards *antiqua*) *custuma*, referred to in the letters patent of that king, quoted by Lord Coke, 2 Inst. 59; and Lord C. J. Vaughan, Vaugh. R. 162; and which those judges rightly conjectured was made at the parliament of 3 Edw. 1, West. 1. The record from which it was taken, (which was collated by the industry of Mr. Hargrave,) is among the originalia of 3 Edw. 1, in the exchequer, and commences "a la novele custume ke est graunte par tous le graunz del realme, par la prière des comunes, des marchaunts de tout Engleterre est purveu," &c., &c. The rate of custom is fixed on all wools, wool-fells, and leather, and for the first time comptrollers and collectors are to be appointed, and the cocket or clearance under two seals of office, one to be kept by two persons chosen *de plus leaux et plus pussaunz* of every county, and another by a person appointed by the king, (before this the duties had been collected by the king's bailiffs and port-reeves.) This custom was called the *nova custuma* till the 22 Edw. 1, when the king, without parliament, set a new imposition of 40s. a sack, and then for the first time the *nova custumi* went by the name of *antiqua custuma*, which appears to have misled the compiler of the text. Lord Bacon, also, is compelled to admit that the notion of the duties originating, before this statute, at common law, was unfounded, although he was advocate for the crown's claim to impose duties at ports by prerogative in the "great case of impositions." Stat. Tri. xi. 33; V. 2, 371, (8vo ed.;) and Mr. Jardine's useful Index, p. 192. Lord Hale, however, does not deny that customs on wool were payable before this statute. Indeed, the 51 H. 3, *de Scaccario*, expressly provides for their collection; but they vanished after the stat. of Edw. 1, and he establishes that the definite custom on wools, wool-fells, and leather, which was the great foundation of the custom revenue, originated with that statute. The maltolt imposed by the king alone of 40s. in 22 Edw. 1, was soon abrogated by parliament, and it seems no custom was afterwards permanently acquiesced in, unless by parliamentary authority. Vide Lord Hale concerning the customs, Harg. Tracts, 146, 147. The case of impositions, Sta. Tri. xi. 29, *et seq.*; V. 2, 371, (8vo ed.) and especially Hakewill's elaborate argument in the House of Commons on this case.]

It appears plainly from the great charter, (Magn. Ch. c. 30,) that some customs were due at the time this was made, and such as are therein called old customs.

By the statute *de Scaccario*, (51 H. 3, st. 5, § 6,) the manner of accounting by the collectors of the customs upon wool is ascertained.

The words, *quandam novam consuetudinem, de lanis, pellibus et coriis*, contained in the grant to Edward the First, imply strongly, that there was before a custom upon wool, wool-fells, and leather.

This false ground(b) being removed, the next endeavour shall be, to

show the true ground upon which the position contended for is built; namely, that the origin of customs was with the consent of parliament.

¶(b) Magna Charta, c. 30, undoubtedly alludes to old customs, but in no way to customs on wool. The stat. *de scaccario*, 51 Hen. 3, appoints the mode of collecting customs on wool ("*laines*;"') but it nowhere mentions wool-fells or leather, *peauls* and *guyre*, which it doubtless would have done had the customs on those articles been an ancient custom then existing; so that at least the custom on these two articles appears to have been of entirely new creation by the 3 Edw. 1; and as for the inference drawn in the text from the words *quandam novam consuetudinem de lanis pellibus et coriis*, they appear quite as much (and I think rather more) to import a new and original duty on those articles, as a fresh duty in place of one already existing on them. The "*false ground*" which the compiler of the text is so anxious to remove, appears therefore to be one of the strongest grounds on which the necessity of parliamentary consent to customs as well as subsidies can be placed. In the three cases in Dyer, 43, 92, 165, the judges fell into the mistake of supposing that the *antiqua custuma* on wool, wool-fells, and leather, originated at common law; and in Dyer, 42, it is even said that the 14 Edw. 3 is the first statute which speaks of customs. Lord Coke, 2 Inst. 59, and after him Lord Vaughan, Vaugh. R. 162, pointed out this error by referring to the letters patent of 3 Edw. 1, reciting the grant of this duty to the king by parliament. Lord Bacon was constrained to admit the error, though favourable to his argument in the case of impositions; and Lord Hale has subsequently placed the matter beyond doubt by giving the substance of the statute itself, granting the duty, from the originalia in the exchequer.

In order to discover the origin of customs, which are taxes of a particular kind, it will be proper to consider the origin of taxes in the general.

In that very ancient record *de modo tenendi parliamentum tempore Regis Edw. filii Ethelredi*, are these words, *debent auxilia peti in pleno parlamento*. 2 Inst. 533.

As the Saxon laws were by this prince, surnamed the Confessor, collected into a body, it is very probable that the method, practised in his time, of granting aids in full parliament, was agreeable to those laws.

In the laws of the Confessor, which were afterwards confirmed by William the Conqueror, are these words, *Debet etiam rex omnia ritè facere in regno, et per judicium procerum regni*.

Wilk. Leg. Anglo-Sax. 200; Edw. 17.

If all things ought to be done by the king rightly in the kingdom, and with the advice of the great men of the realm, surely a thing of so much consequence as that of imposing taxes ought to be so done.

The fifty-second law of the Conqueror, by which the feudal law seems to have been introduced into England, the terms thereof being quite feudal, runs thus: *Statuimus ut omnes liberi homines fœdere et sacramento affirment, quod infra et extra universum regnum Angliæ, quod olim vocabatur regnum Britannia, Willielmo regi suo domino fideles esse volunt, terras et honores illius fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere*.

Wilk. Leg. Anglo-Sax. 228; Leg. Guil. Conq. 52.

The fifty-fifth law of the Conqueror runs thus: *Volumus etiam ac firmiter præcipimus et concedimus, ut omnes liberi homines totius monarchiæ regni nostri prædicti habeant et teneant terras suas et possessiones suas bene et in pace liberas ab omni exactione injusta, et ab omni TALLAGIO, ita quod nihil ab eis exigatur vel capiatur, nisi servitium suum liberum quod de jure nobis facere debent et facere tenentur, et prout statutum est eis, et illis a nobis datum et concessum jure hæreditario in perpetuum per commune concilium totius regni nostri prædicti*.

Wilk. Leg. Anglo-Sax. 228; Leg. Guil. Conq. 55.

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As the words *per commune concilium totius regni* are not contained in the fifty-second law, it has been doubted, whether that law were made with the consent of the *commune concilium totius regni*. It is highly probable that it was, inasmuch as it appears, from the fifty-fifth law, that a law, introductive of the feudal law, had been made during the reign of the Conqueror with such consent; and there is no law extant, antecedent to the fifty-fifth, except the fifty-second, by which the feudal can be supposed to have been introduced. It is not material, whether the feudal law were introduced by the fifty-second law, or by some other law, made during the Conqueror's reign; for, if it were introduced by any law, to which the *commune concilium totius regni* did consent, that is sufficient to show all that the present question requires to be shown, namely, that it was not introduced without such consent.

If this be so, that the feudal law was not introduced without the consent of the *commune concilium totius regni*, it may be fairly inferred, that there was no right in the king alone of introducing it without such consent; for, if there had been such right, it would in all probability have been asserted by a prince, whose best title to the crown, whatever other title he might think proper to set up, appears to have been founded in conquest.

By the fifty-fifth law of the Conqueror it is declared, that all the freemen of the monarchy shall have and hold their lands and possessions free from all unjust exaction, and from every TALLAGE, so that nothing shall be exacted or taken from them, except such free services as they of right owe and ought to do to the king.

The word *tallage*, derived from the French word *tailler*, which signifies to cut off part of a thing, is a most comprehensive word; for it includes all subsidies, taxes, and impositions whatsoever.

Spelm. Gloss.; 2 Inst. 531, 532.

Is it to be imagined that unless the people had a right to be free from the imposition of any *tallage* by the king alone, such right should be granted them by a conqueror? A conqueror may, for the sake of making himself secure in a new conquest, think it prudent to confirm their ancient privileges to his conquered subjects; but it is scarce to be hoped that he should grant them any new privilege.

By the introduction of the feudal law, inferior lords, and the king as supreme lord, acquired a right to divers aids, which were incidental to feudal tenure. These were an aid for making the lord's eldest son a knight; another for the marriage of his eldest daughter; and a third for the ransom of his person when taken prisoner.

Cust. de Norm. c. 35; Mad. Hist. Exch. 427.

Not content with these aids, inferior lords demanded an aid to enable them to pay their fines to the king, and another to enable them to pay their debts; nay, it became a question in the reign of Henry the Second, whether they might not demand an aid whenever they entered upon any military expedition.

Mad. Hist. Exch. 428.

While inferior lords thus oppressed their tenants under the pretence of demanding aids, the king in his turn required from them divers aids, to which they were not liable. This was at length carried so far, that the king did, upon the occasion of any war, assess what sums he pleased upon every knight's fee. Exactions of this kind gave great dissatisfaction, and

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became at length so grievous, that the people in the reign of John flew to arms; and being successful compelled him to sign a charter.

Mad. Hist. Exch. 419, 420, 421.

By a clause in that charter the people were restored to the privilege of not being taxed without the consent of parliament, which they had enjoyed under their Saxon monarchs; and which, except as to the aids incidental to feudal tenure, had been recognised by the Conqueror.

Matt. Paris, 257.

The clause runs thus: *Nullum scutagium vel auxilium ponam in regno nostro, nisi per commune concilium regni nostri, nisi ad corpus nostrum redimendum, et ad primogenitum filium nostrum militem faciendum, et ad filiam primogenitam semel maritandam. Et ad hoc non fiet nisi rationale auxilium—Et ad habendum commune concilium regni de auxilio assidendo, aliter quam in tribus casibus prædictis, summoneri faciemus archiepiscopos, &c.*

By this clause even the aids incidental to feudal tenure were to be reasonable, and what was to be paid for two of these was afterwards ascertained by a statute. The third, for the ransom of the king's person, was in its nature so uncertain, that the value thereof could not easily be ascertained. The ascertaining, as far as it could be done, of the aids, to which the king had clearly a right as supreme lord, shows how contrary it is to the genius of the English constitution, to have any thing of this kind depend upon the will of the reigning prince.

1 Westm. 138.

Under a pretence that the charter of John was extorted whilst he was under duress, no regard was paid to it by his son Henry the Third; and the clause just mentioned was omitted in the Great Charter. During the reign of Henry, and during a great part of the reign of Edward the First his successor, the practice of assessing aids without the consent of parliament was revived: but it occasioned so much discontent, that, in the twenty-fifth year of his reign, Edward added some chapters to the Great Charter, which did effectually supply the place of the omitted clause.

By one statute, 25 E. 1, c. 5, after reciting that divers people of the realm had before given to this prince some aids and tasks, towards his war and other businesses, of their own good-will, it is declared, "that such aids, tasks, or prizes shall not be drawn into a custom, for any thing that hath been done heretofore."

It is probable that the recital in this statute was more calculated to throw a veil over some late transactions, than to represent the real truth of the case; but however this was, it concludes against the right of the king alone to impose aids and tasks.

By another statute it is declared, "that no kind of aid, task, or prise shall henceforth be taken for any business but with the common assent of the whole realm, and for the common profit thereof, saving the ancient aids and prizes due and accustomed."

Conf. Chart. 25 E. 1, c. 6.

Not many years after, this prince did, by his own authority, impose a tallage upon cities, towns, and boroughs.

2 Inst. 532.

In the next year this prince required of all freeholders, possessed of land to the value of twenty pounds a year, an aid for carrying on a war in Flan-

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ders, which they refused to pay, because it had not been assessed as was required by the 25 E. 1, c. 6, with the common assent of the whole realm.

The imposing of this tallage, and the demand of this aid occasioned great murmurings and discontents amongst the commons. To prevent the ill consequences of these murmurings and discontents, and to quiet the minds of the commons, the statute *de tallagio non concedendo* was made in the thirty-fourth year of his reign.

By this statute, 34 Edw. 1, st. 4, c. 1, it is declared, that "no tallage or aid shall be imposed or levied by us or by our heirs in our realm, without the good-will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land."

No words can be plainer or more absolute than the words of this statute are; but it ought to be observed in particular, that the word *tallage* is therein contained, which, besides being the most comprehensive word that could have been made use of, is one of the words contained in the fifty-fifth law of the Conqueror.

Upon the whole, it appears almost beyond a doubt, that the various struggles of the people were not to amend the English constitution; but to deliver themselves from the encroachments made at different times thereupon. They obtained no more from John when he was in their power; they obtained no more at any time since; they obtained no more at this time than not to be taxed without the consent of parliament. This they had a right to, for it was part of the constitution; and had by the Conqueror, when in the plenitude of his power, been allowed so to be.

If this be so, that no tax could constitutionally be imposed without the consent of parliament, it follows, that there never could have been in the king alone a right of imposing such taxes as have obtained the name of customs.

Besides the general reasons, which hold for the people's having always had the privilege of not being taxed in any case without the consent of parliament, there are some particular ones for their having had it in this. As nothing was of more consequence to the people, and more especially as they were inhabitants of an island, than the encouraging of foreign trade, it highly concerned them to take care that this should not be loaded with improper or excessive duties. If, moreover, as has been observed, it was the practice of the most early times to impose customs for a continuance, it was more necessary that they should have been well considered in parliament before they were imposed, than that other taxes which were to last but a short time should.

It was not only fit, for these and divers other reasons, that the people should at all times have had this privilege; but there is a circumstance which strongly evinces that they in fact always had it; namely, that the right of imposing customs was given up by some princes who asserted a right to that of imposing other taxes.

When Henry the Third granted the Great Charter, it is plain, from its being therein omitted, that he would not agree to the insertion of that clause contained in the charter granted by John, by which no aids, except those due by tenure, were to be imposed without the consent of parliament. It is, however, declared by the Great Charter, (a) "that all merchants, if they were not openly prohibited before, shall have their safe and sure conduct to depart out of England, to come into England, to tarry in and go

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through England, as well by land or by water, to buy and sell without any manner of evil tolts, by the old and rightful customs."

(a) Magn. Ch. c. 30.

It is pretty clear that by evil tolts, as here opposed to old and rightful customs, are meant customs imposed without the consent of parliament: but if any doubt remained as to the meaning of those words, it is removed by a subsequent statute,

25 Ed. 1, st. 1, c. 7. The words of this statute are, "And forasmuch as the greater part of the commonalty of the realm find themselves sore grieved with the evil tolt of wool, that is to say, of forty pence for every sack of wool, and have made petition to us to release the same, we at their requests have clearly released it, and have granted that we shall not take such things without their common assent and good-will, saving to us and our heirs the customs of wools, wool-fells, and leather, before granted by the commonalty aforesaid."

In the printed statutes, the words *quarante soudz*, contained in this statute, are translated forty shillings. This does not seem to be a just translation; for it is very improbable that so large a duty should at that time have been imposed upon wool. The quantity of middling wool, equal to what was anciently called a sack, is not at this day worth above nine pounds; and if the difference between the present value of money and the value of it at that time be considered, it will be found that a duty of forty shillings was equal, or nearly so, to the whole value of a sack of wool.

If from considering these two statutes it appears that by evil tolts such customs as had been imposed without the consent of parliament were intended, it follows that Henry the Third, who would not give up the right of imposing other aids, has, by the Great Charter, admitted that customs which are imposed without such consent are not rightful.

From a patent of Edward the First, dated in the third year of his reign, which has been already cited to another purpose, it is evident, that a grant of a custom upon wools, wool-fells, and leather, had been made by the *prelati et magnates et tota communitas mercatorum* to this prince and his heirs.

It was more than twenty years after the date of this patent before this prince gave up, by the statute called *Confirmatio Chartarum*, the right of imposing aids; and in the mean time it is certain that he did in fact exercise it. Can any good reason be assigned for his accepting a grant of a custom, which amounted to a confession that without such grant he could not have imposed it, so many years before he gave up the right of imposing aids, except his being persuaded that he had not so good a right to impose customs as he had to impose aids?

25 Ed. 1, c. 6.

It must be submitted to the consideration of the reader, whether what has been said be sufficient to show that the origin of customs was the consent of parliament. But, however that may be, it is certain, that if the people had not before the privilege of being exempt from customs imposed without such consent, this privilege was fully granted to them by the two statutes of Edward the First, (a) called *Confirmatio Chartarum* and (b) *De Tallagio non concedendo*.

(a) 25 Ed. 1, c. 6. (b) 34 Ed. 1, st. 4, c. 1.

It is not necessary to the present question to show by how many subse-

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quent statutes this privilege has been confirmed; but it will not be improper to mention what happened in the reign of Edward the Third.

A great part of the wool grown in England being in the reign of this prince manufactured into cloth, a question arose, whether a duty, in proportion to the quantity of wool used in making cloth, should be paid upon the exportation of woollen cloth? It was resolved that, as the wool was by the labour of man changed into another sort of merchandise, no custom ought to be paid; and therewith the king, as appeareth by the record in the Exchequer, held himself satisfied.

4 Inst. 29.

It appears that, by a statute, not in print, made in the twenty-first year of this prince's reign, a duty was granted him upon woollen cloth exported; and the reason of granting it is said to be—*quia jam magna pars lanæ regni nostri in eodem regno pannificitur, de qua custuma aliqua non est soluta, per quod proficuum quod de custumis et subsidiis lanarum, si extra regnum duce-
rentur, percipere debemus, multum diminuitur, &c.*

Orig. de Scacc. 24 E. 3, Rot. 13; 27 E. 3, Rot. 4; 1 Inst. 30.

The following remark of Lord Chief Justice Coke upon these transactions is very proper:—"If in any case the king might by his prerogative have set an imposition, he might have set one in this; for, as it appeareth from the record, by making of cloth the king lost his custom of wool."

4 Inst. 30. ||*Vide* Mr. Hakewill's and Mr. Yelverton's arguments against the right of the crown to impose customs—which are far more satisfactory than those above in the text. Sta. Tri. xi. 36, *et seq.*||

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1. Of the Duties upon Wool, Wool-fells, and Leather.

It does not appear from any record now extant at what time they were first imposed; but it seems clear, that the duties upon wool, wool-fells, and leather, are the most ancient of all the customs; for no mention is made in the records of the most early times of any other.

4 Inst. 29; Dyer, 165. ||It now appears, by the record published by Lord Hale, that they were first imposed by stat. 3 Ed. 1; but there were duties on wool existing before. *Vide ante.*||

The statute *de Scaccario*, (51 H. 3, st. 5, § 6,) in directing how collectors of the customs shall account, does indeed say they shall account for every charge in a ship whereof custom is due; but nothing is therein particularly mentioned except wool.

From a patent of Edward the First it appears, that a grant was made in the third year of his reign to him and his heirs of the following custom: *de sacco lanæ dimid. marc., de 300 pellibus dimid. marc., et de lasto corii xiii. s. iiii. d.*

Rot. Pat. 3 E. 1, m. 1, n. 1; Rot. Fin. 3 E. 1, m. 24; 2 Inst. 59.

Some years after, the merchant strangers, in consideration of some privileges and immunities obtained from this prince, did, by a charter, grant to him and his heirs, *de quolibet sacco lanæ 40d. de incremento ultra custumam antiquam dimid. marc. quæ prius fuerit persoluta, et sic pro lasto coriorum dimid. marc. et de trecentis pellibus lanatis 40d. ultra certum illud, quod et antiqua custuma fuerit, prius datum.*

Chart. Mercatoria, Rot. Chart. 31 E. 1, n. 44; 2 Inst. 59.

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As this charter speaks only of these commodities being, at the time it was granted, liable to the custom granted to this prince in the third year of his reign, it may very well be concluded that all the old customs upon them ceased from the time of that grant. From this time the distinction, met with in the books, of *Antiqua Custuma* and *Nova Custuma*, seems to have been first made; that granted before to this prince being called, probably because it was given in lieu of the ancient custom upon those commodities, *Antiqua Custuma*, and this now granted by the merchant strangers being called *Nova Custuma*.

In the time of Edward the Third the woollen manufactures were so established in England, that great part of the wool grown in the kingdom was made into cloth. In order to make amends to the crown, for the loss of the custom upon wool hereby sustained, a duty was granted upon woollen cloth exported.

Orig. de Scaccar. 24 Ed. 3, Rot. 13; 27 Ed. 3, Rot. 4; 4 Inst. 30.

The duties upon wool and wool-fells imported, after having been often varied, are now at an end; the exportation of both being prohibited by divers statutes.

3 E. 4, c. 1; 4 E. 4, c. 1; 14 E. 4, c. 3; 13 & 14 C. 2, c. 18; 7 & 8 W. 3, c. 28; 9 & 10 W. 3, c. 40. ¶The acts on this subject were consolidated, and fresh provisions enacted, by 28 G. 3, c. 38: but this statute is now repealed by 6 G. 4, c. 105.¶

The exportation of leather was once prohibited. Liberty has been since given to export it; but, instead of reviving the old duty, it was made subject to the general duty of poundage.

1 Eliz. c. 10; 12 C. 2, c. 4, § 10.

The duty upon woollen cloth exported, after having undergone various changes, was, in the reign of William the Third, entirely taken off, and with this all these ancient duties ended.

11 & 12 W. 3, c. 20.

2. Of the Duty of Tonnage.

The duty upon wine imported is very ancient; it having been, as long ago as the reign of Henry the Third, accounted for by the king's butler under the name of prisage.

2 Inst. 59; Rot. Pat. 40 H. 3. [Prisage of wines, says my Lord Hale, seems to be an ancient duty taken by the crown in all times. It is no part of that prerogative, which is called purveyance, to take provisions for the king's household, but it is a fixed settled inheritance, though possibly in its original it might have taken its rise from thence. And therefore it was agreed, 40, 41 Eliz., in a *quo warranto* against Haughton, who had the prisage of London and the ports adjacent, and the office of butler there, for years by the king's grant, that it was grantable for years or otherwise. In Ireland, it hath been received to the use of the crown by the family of the Butlers, now Earls of Ormond, being the king's chief butlers of Ireland by tenure. See Hale's tract concerning the Customs, 116.] ¶The duty of prisage and cellarage was partially abolished by 49 G. 3, c. 98, § 35, 36. This act, however, is now repealed by the general repealing statute 6 G. 4, c. 105; and wines are imported on paying the duties imposed by 6 G. 4, c. 111, the general act for granting duties of customs,—which contains, § 15, a proviso saving the rights of prisage in those ports where the right has not been purchased by the crown.¶

The practice anciently was to take for this duty two tons of wine from every ship having twenty tons or more on board, one before the mast, the other behind it, paying twenty shillings for each ton.

Flet. lib. 2, c. 22; Rot. Parl. 28 E. 1; Rot. Pat; 40 H. 3; 2 Bulstr. 254; Davis, 8 b; 4 Inst. 30.

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This duty, because the wine was taken for the king's use, obtained the name, and still retains the name of prisage.

4 Inst. 30.

By the *charta mercatoria*, the merchant strangers granted a duty of two shillings *per* ton, to the king and his heirs, upon wines imported by them: but they were to be exempt from the duty of prisage, to which the English merchants still continued liable.

Chart. Merc. 31 E. 1, n. 44; 2 Bulstr. 254; 2 Inst. 30.

This duty, from its being received by the king's butler, obtained the name of butlerage, and has been since called by that name.

4 Inst. 30; 6 G. 1, c. 12, § 8. [All the books that speak of *butlerage* mention it as a favour to the foreign merchant, that, instead of a pre-emption of wine in specie, there was this duty of 2s. laid upon each ton; and no doubt, when the duty was first laid on, it was put upon this colour, that it was instead of the prisage and as if better for the merchant. And indeed thus far it was better for the merchant, that it compounded with him for the king's setting the price upon the two tons, which very often created grievous exactions; for now the tribute of *butlerage* being laid *per* ton, the merchant knew upon what terms he imported wine into England. But the policy of Edward the First was much deeper; for by this he hindered all frauds in the importing of wine; for, if the vessel had held above twenty tons, the king had no more than two tons by way of pre-emption; and therefore enlarging the vessel was in fraud of the king. Besides, that by this means the king always received money from the merchant, whereas before the merchant used to receive money from the king, and to agree with the king for the pre-emption before he would break bulk; and now the prisage lying only on the king's subjects; when they had imported wine, it was necessary for them to come to the king's terms of pre-emption, and that money being paid to the subject was not carried out of the realm: so that by this policy of Edward 1, all the money was kept within the realm: for on the wine imported by foreign merchants, they paid the *butlerage* in money to the crown; and for the wine imported by the subject, on which *prisage* was due, the money which the crown paid for pre-emption was paid to the subject. Gilb. Hist. Excheq. 211, 212.]

In the sixth year of the reign of Richard the Second, a duty of two shillings *per* ton upon all wine imported was granted to him; but it was only to continue for two years.

Inst. 32; Dav. 11 a.

This duty obtained the name of tonnage; and all duties since imposed upon wines have been so called.

It appears from divers records, that the duty of tonnage was afterwards sometimes one shilling and sixpence *per* ton; sometimes two shillings; and sometimes three shillings; and that it was not granted for life, but upon a particular occasion, or for one or more years; and that conditions as to the application thereof were frequently annexed to the grants.

2 Inst. 32.

In the third year of Henry the Fifth, a duty of three shillings *per* ton was granted during his life.

Rot. Parl. 3 H. 5, n. 50.

After the death of this prince, the custom of granting the duty of tonnage for a few years only was revived, it not being granted to his successor Henry the Sixth for life, until the thirty-first year of his reign.

31 H. 6, c. 8.

It was afterwards granted to Edward the Fourth, Henry the Seventh, Henry the Eighth, Mary, Elizabeth, and James the First, for their respective

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lives; and to all of them, except Edward the Fourth, in the first years of their respective reigns.

Rot. Parl. 4 E. 4; 12 E. 4, c. 3; Rot. Parl. 1 H. 7; Rot. Parl. 1 H. 8; 6 H. 8, c. 14; 1 E. 6, c. 13; 1 Mar. c. 18; 1 Eliz. c. 19; 1 Jac. c. 33.

The duty of tonnage was not granted to Charles the First until the sixteenth year of his reign; and it was then only granted from time to time, and for very short spaces of time.

16 C. 1, c. 8, 12, 22, 25, 29, 31, 36. *¶*Vide, on this subject, Clar. Hist. Rebel. b. 3, p. 207.

3. Of the Duty of Poundage.

The duty of poundage is so called, from its being paid at the rate of a certain sum in the pound.

The first instance upon record of this duty is a grant of threepence in the pound, made to Edward the First, upon the goods imported by merchant strangers.

Rot. Chart. 31 E. 1, n. 44; 27 E. 3, st. 2, c. 26; 2 Inst. 59.

In the forty-seventh year of the reign of Edward the Third, a duty of sixpence in the pound was imposed upon all goods exported and imported, except wools, wool-fells, leather, and wines; and English merchants, as well as merchant strangers, were made liable thereto.

4 Inst. 32; Rot. Parl. 47 E. 3, n. 14; Dav. 10 b.

In the fourteenth year of the reign of Richard the Second, this duty was raised to one shilling in the pound; but it was three years afterwards reduced to sixpence.

Rot. Parl. 14 R. 2, n. 12; 17 R. 2, n. 14.

It was raised to eightpence in the pound, in the second year of the reign of Henry the Fourth; and, in the fourth year of the same prince's reign, to one shilling.

Rot. Parl. 2 H. 4, n. 9; 4 H. 4, n. 28.

From this time, to the ninth year of the reign of William the Third, it continued at one shilling in the pound.

4 Inst. 32; 12 C. 2, c. 4.

Since the sixth year of the reign of Richard the Second, this duty, except in a very few instances, has been comprised in the same grant with that of tonnage; and has been granted, upon a particular occasion, for one or more years, or for life; and conditions as to the application thereof have been frequently annexed.

Rot. Parl. 6 R. 2, n. 13; 4 Inst. 32.

Heretofore credit was given to a merchant's papers for the value of the goods subject to this duty; nor was he obliged to swear to this, unless he neglected to produce a bill of lading.

27 E. 3, st. 2, c. 26.

Many frauds being discovered, a power was given to the officers of the customs to open and examine goods in order to come at the true value: but no oath was enjoined.

12 E. 4, c. 3.

The practice of our ancestors in not enjoining an oath as to the value of the goods seems worthy of imitation. Many considerate persons have been of opinion that the introducing of so many custom-house oaths has not been

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of use even to prevent frauds in the revenue ; for that, although a few persons may be conscientious, and swear truly, more is lost by relying upon oaths, and of course not examining so strictly, than is thereby saved. If this be so, it appears to be high time that many, if not all, custom oaths should be laid aside; for nothing has so much contributed as these oaths have, to take off that reverential awe which ought to be had for an oath, and consequently to open the sluices of perjury which have so deluged the land.

The method of ascertaining the value of the goods subject to this duty by a book of rates was practised in the reign of James the First, and in some of the preceding reigns.

4 Inst. 33.

[For the history of the customs before and during the time of Edward the First, the reader is referred to the fifth and sixth chapters of my Lord Hale's Treatise upon the Customs, and to the eighteenth chapter of Mr. Madox's History of the Exchequer.]

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UNDER this head no more is intended than to give a general account of the present state of the customs: to give a particular account of the various duties imposed by divers statutes on the different kinds of goods would be tedious, unentertaining, and foreign to the design of this work. It would too be unnecessary; for this has been already done, with great care and accuracy, by Mr. Crouch and Mr. Saxby; in whose books, professedly written upon the subject, such persons as desire to have a complete knowledge of this part of the public revenue will meet with satisfaction.

¶All the acts respecting the customs, to the number of 387, (exclusive of the Irish acts,) are now repealed by 6 G. 4, c. 105; and the provisions relating to the customs and to smuggling are now consolidated in six acts. "An act for the management of the customs." 6 G. 4, c. 106. "An act for the general regulation of the customs." 6 G. 4, c. 107. "An act for the prevention of smuggling." 6 G. 4, c. 108. "An act for granting duties of customs." 6 G. 4, c. 111. "An act for the warehousing of goods." 6 G. 4, c. 112; and "An act to grant certain bounties and allowances of customs." 6 G. 4, c. 113. These acts have, however, been amended in some points by 7 & 8 G. 4, c. 56. 9 G. 4, c. 76. 10 G. 4, c. 43; and see Pope's Customs Guide, *passim* (14th ed.)

Much the greater part of the duties at this day payable are comprised under the denominations of tonnage and poundage.

Soon after the Restoration, the practice of granting a subsidy of these duties to the king for life was revived; and has been ever since continued.

In process of time divers other subsidies of tonnage and poundage were granted. But of all that are now paid, only that called the further subsidy, which was first granted in the reign of William the Third, is granted to his present majesty for life, the rest being appropriated to divers uses.

9 W. 3, c. 23; 1 G. 2, st. 1, c. 1. [Upon the accession of his late majesty, a fixed revenue was granted to the crown, and this subsidy was carried to the aggregate fund. 1 G. 3, c. 1. That fund forms a part of the *consolidated fund* created by 27 G. 3, c. 13, to which the several duties of the customs, excise, &c., thereby granted or consolidated, are directed to be carried.]

By the 6 Ann. c. 26, § 17, it is enacted, "That all and every act of parliament made in England, and in force there, touching and concerning any custom or subsidies there, which are not contrary to or inconsistent

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with the articles of the union of the two kingdoms of England or Scotland, or any of them, shall extend to Scotland.”

1. *Of the Duty of Tonnage.*

The ancient duty of prisage upon wine imported does still continue.

¶ See, as to prisage, *infra*, p. 123, 124.¶

It has been frequently holden in the Court of Exchequer, for the sake of preventing frauds in this duty, that single prisage shall be paid for nine tons and a half of wine, and double prisage for nineteen tons, although *stricti juris* no duty was to be paid for less than ten tons. If only nine tons have been imported, prisage has been seldom allowed without a proof of fraud; and if the quantity imported has been less than nine tons, it has never been paid.

Hard. 477.

By a charter granted to the city of London, in the first year of the reign of Edward the Third, the citizens are exempted from the duty of prisage. The words of it are, *et quod de vinis ipsorum civium nulla prisa fiat per aliquem ministrum nostrum, vel hæredum nostrorum seu ulterius contra eorum voluntatem; viz. de uno dolo ante malum et alio dolo retro, nec aliquo alio modo, sed inde perpetuo sint quieti.*

Hard. 301.

The construction of this charter has been, that the exemption extends only to such citizens as are inhabitants of the city, and only to such wines as are imported in the port of London; except a ship be by stress of weather driven into any other port.

Hard. 310, 311, Waller v. Travers.

Heretofore the duty of tonnage was the same upon all wines imported: but in some modern statutes this is different upon wines of different kinds; and there is in the general a much larger duty paid in the port of London than in the out-ports.

The different subsidies of tonnage are, from the time or manner of their having been imposed, thus distinguished:—

That imposed by the 12 C. 2, c. 4, is called the old subsidy.

That imposed by the 9 & 10 W. 3, c. 23, is called the further subsidy.

That imposed by the 2 Ann. c. 9, is called the one-third subsidy.

That imposed by the 3 Ann. c. 5, is called the two-thirds subsidy.

That imposed by the 18 G. 2, c. 9, is called the subsidy of one thousand seven hundred and forty-four.

All these subsidies were at first imposed for a time; but the several acts by which they were imposed have been from time to time continued, and are all now in force.

¶ The new customs act, 6 G. 4, c. 111, § 22, contains a provision for keeping an account of the hereditary revenue of subsidies of tonnage, poundage, &c., separate from the other duties of customs and tonnage.¶

Besides these subsidies, to which all wines imported are liable, there are duties imposed upon divers kinds of wines by particular acts of parliament.

Before the Restoration only wines were liable to a duty of tonnage; but since that time divers other liquors are, by particular acts of parliament, rendered liable to a duty of tonnage.

Prisage wines exempted from duty. By 12 C. 2, c. 4, § 15, it is pro-

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vided, "That the prisage of wines, or prise wines, shall not be charged with the payment of any custom, subsidy, or sum of money, imposed upon wines by this act."

Prisage wines made liable to duty. By 1 Jac. 2, c. 3, § 6, it is enacted, "That no merchant shall be charged with any duty imposed by this act for the prisage wine which he imports; but that it shall be received and taken from the person who hath or enjoyeth the benefit of the said prisage wine."

[[See, as to prisage, p. 123, 124.]]

As the 9 & 10 W. 3, c. 23, by which a subsidy of tonnage is imposed upon wines imported, is quite silent as to prisage wine, the construction has been, that prisage wine is chargeable with the duty of tonnage imposed by this statute.

In an action of *assumpsit* for 500*l.* received to the plaintiff's use, it was found, by a special verdict, that the defendant claimed the prisage of all wine imported, under a grant from Charles the First; and that, by virtue of the grant, he was to hold the said prisage wine discharged of all aids and taxes; and the question was, Whether the grantee should pay the subsidy of tonnage imposed upon wine imported by the 9 & 10 W. 3, for prisage wine? After judgment for the grantee in the Court of Exchequer, a writ of error was brought in the Exchequer-chamber. It was insisted for the grantee, that prisage wine was a part of the ancient royal revenue; that if it were now in the hands of the queen, she could not pay a duty for her own prisage wine; and that the grantee who claims under the crown ought to have the same exemption; and the rather because the prisage of all wine imported was granted to him, with an immunity from aids and taxes. It was on the other side admitted, that if the wine had remained in the hands of the queen, no duty ought to have been charged upon it; it being absurd that the queen should be chargeable with a duty to herself for her own wine: but it was said, that as the wine comes into the hands of a subject who may pay a duty for it, there is no absurdity in his being charged with the duty. It was likewise said, that the clause of immunity could only extend to the duty of tonnage then subsisting, and not to any duty which might be granted by a future act. It was holden by all the judges, that, immediately upon importation, the subsidy of tonnage imposed by the 9 & 10 W. 3, c. 23, attaches upon all the wine; and that the grantee receives whatever part he takes for prisage chargeable therewith. And the judgment was reversed.

Salk. 617, *Paul v. Shaw*; [Parker, 209, S. C., cited by the Chief Baron, and Lord Trevor's argument in part stated. The question determined by this case appears to have been a long time in agitation. In a manuscript book in the office of the Committee of Trade, which was obligingly communicated to the editor by Mr. George Chalmers, the author of several valuable political tracts, he has met with the following case:—"Upon an action of *assumpsit* brought, term Pasch. anno 13 W. 3, by William Paul, Esq., lessee of the prisage wines, against Thomas Cocks, Esq., collector of the duty upon wines in the port of London, for 50*l.*, the question upon the special verdict was this, viz. Whether prisage wines were liable to pay the second subsidy, or the duty laid by the act of 9 & 10 W. 3?—Note, It was admitted by the special verdict, that the wines in question had paid the impost laid by the act of 1 Jac. 2, c. 3, and also the additional impost by the act of 4 & 5 W. & M. c. 5, and also 25*l.* per ton, by the act of 7 & 8 W. 3, c. 20.—The case depended in the Court of Exchequer about three years, and had been argued thrice by counsel on both sides; and this day, being 16th June, 1705, it stood for the judgment of the court; but the barons being divided in their opinions, viz.: Mr. Baron Smith and Mr. Baron Price for the defendant, and Mr. Baron Bury, and the Lord Chief Baron for the plaintiff, no judgment could be entered; and

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therefore upon the plaintiff's motion the cause was adjourned into the Exchequer Chamber *propter difficultatem*, to be heard before the twelve Judges.

"Abstract of the argument of the two Barons who were of opinion for the defendant:—

"When the duty of prisage was in the crown no subsidy could be paid, because the crown could not pay duty to itself; but when it was granted out of the crown, then the contradiction ceases. It is the same case with that of a rector who demises or lets out his glebe, and is entitled to receive tithes from his own lessee. The words in Sir William Waller's patent, that they shall be free from all duties and sums of money, whatever, could not extend to exempt prisage wines from duties subsequent to the patent, but only from such as were then in being, and in the power of the crown. The statute of Jac. 2, expressly provides, that the duty laid by the act should be paid by the person that was entitled to the prisage; and the act of 9 & 10 W. 3, c. § 7, appointing that all the clauses, powers, directions, &c., in any former acts, shall be practised and put in execution for levying the duty as fully as if those acts had been recited; prisage wines are as plainly subjected to that duty, as if the said clause in the 1st of James had been recited in the act of 9 & 10 W. 3. The case differs from wreck, prisage wines being imported, which wreck is not, and then they are imported by way of merchandise, for all wines in the ship are originally imported by way of merchandise till the election of the prisage wines is made; and even then, it is not to be imagined that the patentee had it for his own consumption, whatever the crown had before the grant. Although the clause in the 12 Car. 2, § 16, to exempt prisage wines from the tonnage be declaratory, yet the words are to be governed by the subject-matter of the act; and to what purpose was the declaring clause, if prisage wines were not chargeable with the duty by the former part of that act?

"Abstract of the argument of the two Barons who were of opinion for the plaintiff:—

"Prisage wines was a right originally vested in the crown by the common law, and so differs from other duties which were granted by parliament; *inhæret exceptio*, and therefore stood exempt from all duties. The customs called *magna et parva custuma* were not due of common right or by prescription, the one being granted the 12 Edw. 1, the other *lege mercatoriâ*, in 31 Edw. 1, and by common law no imposition could be laid upon goods; and so in the statute of 12 Car. 2, of tonnage and poundage, § 7. Tonnage was first granted 5 R. 2, and afterwards successively the kings received it from the parliament, generally for lives. Prisage was an inheritance; and King James the First had it as such: but he had but an estate for life in the tonnage: the first was his own estate, the other was a gift; so one could not operate on the other. Prisage is very different from purveyance, which is only a power or privilege; but the other is a property, and may be granted. It was originally not chargeable with any duty, and carried along with it an exemption in its own nature. It was not originally imported for sale or by way of merchandise. At the making of the statute of 12 Car. 2, of tonnage and poundage, and the clause relating to prisage, *ut res, ita tempora rerum* are to be considered; and that clause first declares the original right of exemption, and then gives the exemption or particular discharge in virtue of that act. The duty laid by 9 & 10 W. 3 is called a further subsidy, and has such relation to the act of tonnage and poundage, which is the standard, that the whole act seems incorporated into it; consequently the same exemption takes place."]

||By letters patent of 24 Car. 2, the duty of prisage and butlerage was granted to Lord George Fitzroy and the heirs male of his body, with remainder to Charles Fitzroy, Earl of Southampton, and remainder to Henry Fitzroy, Earl of Euston, and afterwards Duke of Grafton, (all natural sons of Charles II. by Barbara, Duchess of Cleveland,) under which grant, in 1806, it was vested in Augustus Henry, Duke of Grafton; and by the operation of the 43 Geo. 3, c. 156, 46 Geo. 3, c. 79, and a contract between the duke and the Treasury, the duty was repurchased by the crown, in consideration of an annuity of 6870*l.* settled on the duke and the heirs male of the body of Henry the first Duke of Grafton; and by the 49 Geo. 3, c. 98, § 35, 36, the duty of butlerage was abolished, and wines are now imported into London, and to those ports where the right of prisage has been purchased by the crown, on payment of the duties of customs and no other. But, by the new customs act, 6 Geo. 4, c. 111, § 15, nothing in

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the act shall extend to affect the right of entering wine for prisage at such reduction of duties as the parties having such right shall be entitled to claim, at any of the ports or places in England or Wales, where the right of prisage has not been purchased by the crown.||

[The ship *Eagle* was a vessel that carried timber from Faversham in the port of Sandwich to the port of London. She had no midship beam, nor any deck, and was an open vessel. All this was found by verdict on an information of seizure for the duty on tonnage, and the court was of opinion that she was not chargeable with the duty of tonnage within the stat. 5 & 6 W. & M., for that statute prescribes no other rule to measure any ship by but from the midship beam and from the deck. Now no other duty is created by that act but according to the measure; so not being measurable according to the act, she cannot be charged by the act. The court also doubted whether the vessel could be said to trade coastwise, as she was an open vessel, and never was at sea, nor could live at sea.

Newerry q. t. v. Colgate. The editor has taken this case from the above book communicated to him by Mr. Chalmers. The date of it is not mentioned: it appears, however, to have been before the year 1695.]

2. *Of the Duty of Poundage.*

The different subsidies of poundage were formerly, from the time or manner of their having been imposed, thus distinguished:

That imposed by the 12 C. 2, c. 4, is called the old subsidy.

That imposed by the 9 & 10 W. 3, c. 23, is called the further subsidy.

That imposed by the 2 Ann. c. 9, is called the one-third subsidy.

That imposed by the 3 Ann. c. 5, is called the two-thirds subsidy.

That imposed by the 21 G. 2, c. 1, is called the subsidy of one thousand seven hundred and forty-seven.

||By an act (6 G. 4, c. 111) intituled, "An act for granting duties of customs," reciting that an act was passed in the present session of parliament, intituled "An act to repeal the several laws relating to the customs,"(a) in which it is declared, "That the laws of the customs have become intricate by reason of the great number of acts relating thereto which have been passed through a long series of years, and it is therefore highly expedient for the interests of commerce and the ends of justice, and also for affording convenience and facility to all persons who may be subject to the operation of those laws, or who may be authorized to act in execution thereof, that all the statutes now in force relating to the customs should be repealed, and that the purposes for which they have from time to time been made should be secured by new enactments, exhibiting more perspicuously and compendiously the various provisions contained in them: And whereas by the said act all the acts and parts of acts by which the duties of customs have been granted will be repealed, and all duties of customs will thereby be made to cease and determine; and it is expedient to make provision for granting other duties of customs in lieu thereof: be it therefore enacted, That from and after the fifth day of January, one thousand eight hundred and twenty-six, this act shall come into and be and continue in full force and operation for granting duties of customs."

(a) 6 G. 4, c. 105.

And by §2 it is further enacted, "That in lieu and instead of all other duties of customs, (except the duties upon corn, grain, meal, or flour,) there shall be raised, levied, collected, and paid unto his majesty, his heirs

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and successors, upon goods, wares, and merchandise, imported into or exported from the United Kingdom, or carried coastwise from one port or place in the United Kingdom to another port or place in the same, the several duties of customs, and there shall be allowed the several drawbacks as the same are respectively inserted, described, and set forth in figures, in the tables to this act annexed, and denominated respectively, 'Table of Duties of Customs inwards,' 'Table of Duties of Customs outwards,' and 'Table of Duties of Customs coastwise.'"

And by § 3 it is further enacted, "That the amount of drawbacks granted, allowed, and made payable upon goods, wares, and merchandise, exported from or used or consumed in Great Britain or Ireland, under or by virtue of any act or acts in force in Great Britain or Ireland, on or immediately before the said fifth day of January, one thousand eight hundred and twenty-six, shall remain and continue payable with respect to such goods, wares, and merchandise, as, having paid the duties imposed upon the importation thereof by any act or acts in force on or immediately before the said fifth day of January, one thousand eight hundred and twenty-six, shall, from and after the said fifth day of January, one thousand eight hundred and twenty-six, be exported from or so used or consumed in Great Britain or Ireland respectively: Provided always, that no drawback shall be allowed for any ashes used in bleaching linen, nor for any brimstone used for the making of oil of vitriol, which shall not have been so used respectively on or before the fifth day of July, one thousand eight hundred and twenty-six, nor unless such drawback be duly claimed on or before the fifth day of January, one thousand eight hundred and twenty-seven."

And by § 4, it is further enacted, "That the duties and drawbacks by this act imposed and allowed shall be under the management of the commissioners of his majesty's customs, and shall be ascertained, raised, levied, collected, paid, and recovered and allowed, and applied or appropriated under the provisions of an act passed in the present sessions of parliament, intituled, 'An act for the general regulation of the Customs.'"

And by § 5, it is further enacted, "That it shall be lawful for his majesty, by and with the advice of his privy council, by his order in council, from time to time to order and direct that there shall be levied and collected any additional duty not exceeding one fifth of the amount of any existing duty, upon all or any goods, wares, or merchandise, the growth, produce, or manufacture of any country which shall levy higher or other duties upon any article, the growth, produce, or manufacture of any of his majesty's dominions, than upon the like article the growth, produce, or manufacture of any other foreign country; and in like manner to impose such additional duties upon all or any goods, when imported in the ships of any country which shall levy higher or other duties upon any goods when imported in British ships than when imported in the national ships of such country, or which shall levy higher or other tonnage or port or other duties upon British ships than upon such national ships, or which shall not place the commerce or navigation of this kingdom upon the footing of the most favoured nation in the ports of such country; and either to prohibit the importation of any manufactured article, the produce of such country, in the event of the export of the raw material of which such article is wholly or in part made being prohibited from such country to the British dominions, or to impose an additional duty not exceeding one fifth as aforesaid upon such manufactured article; and also to impose

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such additional duty in the event of such raw material being subject to any duty upon being exported from the said country to any of his majesty's dominions; and all duties imposed by any such order shall be deemed to be duties imposed by this act."

And by § 10, it is further enacted, "That it shall be lawful to import into the United Kingdom any flax, and any wood being eight inches square or upwards, fit for ship-building, and any bark, or any solid vegetable extract, to be used solely for the purpose of tanning leather, such articles being the growth or produce of the colony of New South Wales, or any of the settlements or dependencies thereof, or of Norfolk Island, or Van Diemen's Land, or of New Zealand, and imported direct from the said places during the remainder of the period of ten years, to be reckoned from the first day of January, one thousand eight hundred and twenty-three, without payment of any duty whatever for the same: Provided always, that before such goods shall be entered as being the growth or produce of any of the said places, except New Zealand, the master of the ship or vessel importing the same shall produce and deliver to the collector or comptroller of the customs at the port of importation, a certificate, under the hand of the proper officer at the place where such goods were taken on board, testifying that proof had been made, in manner required or authorized by any law in force for the time being in such place, that such goods were of the growth or produce thereof, stating the name of the place, and the quantity and quality of the goods, and the name of the vessel in which they are laden, and of the master thereof; and such master shall also make oath before the collector or comptroller of the customs at the port of importation, that such certificate was received by him at the place where such goods were taken on board, and that the goods so imported are the same as are mentioned and referred to in such certificate; and before any such goods shall be entered as being the produce of New Zealand, the master of the importing ship shall make oath, before the collector or comptroller of the customs at the port of importation, that such goods were taken on board such ship at New Zealand."

And by § 11, it is further enacted, "That it shall be lawful for the importer of goods, subject to any of the duties imposed by this act, to warehouse such goods upon the first entry thereof under the laws in force for the warehousing of goods without payment of duty upon such first entry; and that all goods which shall have been so warehoused before the commencement of this act, and shall remain so warehoused after the commencement of the same, shall become liable to the duties imposed by this act, in lieu of all former duties."

And by § 12, it is further enacted, "That for the purposes of this act, the Cape of Good Hope and the territories and dependencies thereof shall be deemed to be within the limits of the East India Company's charter; and the Island of Mauritius shall be deemed to be one of his majesty's sugar colonies, and placed upon the same footing in all respects as his majesty's islands in the West Indies."

And by § 13, it is further enacted, "That all goods, the produce of places within the limits of the East India Company's charter, having been imported into Malta or Gibraltar in British ships, shall, upon subsequent importations into the United Kingdom direct from thence, be liable to the same duties as the like goods would respectively be liable to, if imported direct from some place within the limits of the said charter."

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And by § 14, it is further enacted, "That it shall be lawful to import pease for seed, on payment of the duty imposed by this act, at times when the importation of pease may be prohibited on account of the average price thereof, any thing in any other act to the contrary notwithstanding."

Section 17, recites, that "Whereas it is enacted in the aforesaid act (a) for repealing the several laws relating to the customs, that such repeal shall take effect from and after the fifth day of July one thousand eight hundred and twenty-six: and whereas this present act and several other acts relating to the customs, also passed or to be passed in this present session of parliament, is and are to come into operation and have effect from and after the fifth day of January, one thousand eight hundred and twenty-six, and it is expedient to prevent any doubts which might arise from the continuance of any of the acts now in force relating to the customs after the period when the present and other aforesaid acts passed or to be passed in this present session of parliament shall come into operation; be it therefore enacted, that the enactments and provisions contained and expressed in this act, and in any other act or acts relating to the customs passed in the present session of parliament, which are to commence and have effect from and after the fifth day of January, one thousand eight hundred and twenty-six, shall be, and shall be deemed and construed to be, from and after that period, the only law or laws in force concerning or relating to all matters and things expressed or provided for herein or therein; any thing contained in any of the acts to be repealed on the fifth day of July, one thousand eight hundred and twenty-six, by the aforesaid act of repeal, or in any other act or acts to the contrary notwithstanding."

(a) 6 Geo. 4, c. 105.

And by § 24, it is further enacted, "That all the moneys arising by the duties imposed by this act, (the necessary charges of raising and accounting for the same excepted,) shall from time to time be paid into the receipt of his majesty's exchequer in Great Britain, and shall be carried to and made part of the consolidated fund of the United Kingdom of Great Britain and Ireland, except only as by this act is specially provided, and shall be appropriated in like manner and to the same services as the duties by this act repealed would have been if this act had not been passed."

And by § 25, it is further enacted, "That all moneys arising from any duties of customs, or any arrears thereof, shall be raised, levied, collected, paid or received from and after the said fifth day of January, one thousand eight hundred and twenty-six, for or on account of any goods, wares, or merchandise whatever, imported or brought into the United Kingdom of Great Britain and Ireland, or exported from the said United Kingdom, or brought or carried coastwise or from port to port within the United Kingdom, although the amount of the said duties may have been computed and ascertained as such duties have been computed and ascertained before the said fifth day of January, one thousand eight hundred and twenty-six, and although the goods, wares, or merchandise whereon any such duties of customs may have been charged or may be charged, may have been imported into or exported from the United Kingdom, or brought or carried coastwise or from port to port within the United Kingdom, before the said fifth day of January, one thousand eight hundred and twenty-six, and although any duties of customs due and payable or charged or chargeable thereon, may have been secured by bond or otherwise on or before the said fifth day of January, one thousand eight hundred and twenty-six, shall,

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from and after the said fifth day of January, one thousand eight hundred and twenty-six, be appropriated and applied in like manner and to the same purposes as the duties of customs by this act granted are directed to be appropriated and applied, except as is in this act provided; any act or acts of parliament, law, usage or custom to the contrary notwithstanding; and that all moneys arising by any of the revenues of customs hereafter to be paid or allowed, either upon bond or otherwise, either by way of drawback, bounty, certificate, premium, or allowance, or by any other legal document whatever, from and after the said fifth day of January, one thousand eight hundred and twenty-six, although the amount of the same shall have been computed and ascertained in like manner in which they have heretofore been usually computed and ascertained, or shall have become due before the said fifth day of January, one thousand eight hundred and twenty-six, shall and may be paid or allowed in like manner by the proper officer or officers of the customs out of any moneys in their hands arising from duties of customs respectively.”||

It has been holden, that goods thrown on shore from a ship which has been wrecked, are not liable to any duties; because they are not to be considered as brought into the kingdom by any of the king’s natural-born subjects, or by any other person or stranger, but by the wind and sea.

Vaugh. 166, 167, 168, Sheppard v. Gosnold; 12 C. 2, c. 4, § 1. {See 4 Cran. 347, Peisch v. Ware; Id. 355, n., The Blaireau.} [The point determined in the case of Sheppard v. Gosnold was, that for goods *not intended to be imported into England*, and which were wrecked, no customs were due: for it was expressly found by the jury, that *the goods in question were shipped in foreign parts as merchandise, and not intended to be imported into England, but to be carried into other foreign parts.*—The question, whether goods wrecked were customable, had long depended without receiving any judicial opinion. In Queen Elizabeth’s time, it was raised upon a record, but not decided. To an information claiming goods as forfeited under the stat. of 1 E. 6, because they had been landed without the customs due for them having been paid or agreed for, the defendant justified as vendee of the Lord Cobham, upon whose manor they had been wrecked, and who had seized them under a prescriptive right to wreck of the sea appurtenant to his manor. It does not appear, whether in this case the question was ever argued; the reporter only adds, *Quære si sit bona justificatio*. Saunders’s case, Moor, 224. In the mean time, the practice had uniformly been in favour of the claim of the crown, and the case of Sheppard v. Gosnold was not generally considered as counter-vailing it. The question therefore was again raised: Molloy (lib. 2, c. 5, § 9) says, that in the like case in all circumstances, Hil. 6 W. 3, C. B. between Power and Sir Wm. Portman, the judges, and more particularly Treby, C. J., seemed to be of opinion, that goods wrecked, or flotsam, should pay custom. The matter, however, appears to have been brought in that same year to a final decision in the case of Courtney v. Bower, which was an action brought by Sir Wm. Courtney as lord of the manor of Soar in Devonshire, against two custom-house officers, for seizing goods that had been wrecked upon that manor. The cause was tried before Holt at Exeter, who was with difficulty prevailed with to allow it to be found specially, conceiving the law to have been thoroughly settled by the case of Sheppard v. Gosnold. The special verdict was argued four times in the Court of Common Pleas, where it was at length adjudged by three judges against the claim of the crown; but Treby, C. J., being of a contrary opinion, a writ of error was brought in B. R., where the judgment was affirmed simply upon the authority of the case of Sheppard v. Gosnold. 1 Ld. Raym. 501. Whether this case of Courtney v. Bower were the same in all its circumstances with that of Sheppard v. Gosnold, we are not informed; but the reporter states it as a general proposition, that for wreck and flotsam no customs ought to be paid. Lord Holt, too, upon this case being mentioned a few years afterwards, said, that always since the case of Sheppard v. Gosnold, it had never been a doubt, but that wreck should not pay custom; and that if the case of Courtney v. Bower had been in B. R. he would not have suffered more than one argument, and that *pro formâ tantum*. 1 Ld. Raym. 388.—But though no custom be due for wreck, yet another question arises: Where are the goods to be deposited till it shall appear whether they are wrecked or not? By the stat. of

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27 E. 3, c. 13, no goods are wrecked, but where no property can appear in any person; for although no living creature be saved out of a ship wrecked, as it is said in stat. 3 E. 1, c. 4, yet, if the owner's property can be made out by marks, cocket, letter, or otherwise, the owner shall have his goods, paying what is reasonable for salvage; and he hath a year and a day given him by the 3 E. 1, to prove his property. Therefore it should seem, the lord of a manor, or vice-admiral, hath no right to seize any wrecked goods, till that time be expired; but they ought to be preserved as directed by 3 E. 1, and 4 E. 1, *de officio coronatoris*, that is, to be placed, so as the town where they shall be found may be charged with them during that time. And in regard if any owner of the goods should make out his property to them, he will be liable to pay the customs, if he do not export them again, (as he may) but sell them, here it seems, the officers of the customs should take care, by keeping the goods by consent of the towns that would be answerable for them, or by delivering them to the towns, to be secured, that if any owner can be made out within the year and the day, the king shall have his customs; and the lord of the manor, or vice-admiral, claiming wreck, hath no right to take the goods from them till after the year and day, by the express provision of stat. 3 E. 1.— In the mean time, if the goods are of a perishable nature, it is usual to permit the lord of the manor, or vice-admiral, to dispose of them, upon giving security for the payment of the customs, if any should appear to be due. It has indeed been determined, that the sheriff may in such case make sale of them. *Eyston v. Studd*, Plowd. Comm. 465, 466. See, too, 5 Burr. 2738.] ||By the 6 G. 4, c. 111, foreign liquors, derelict, jetsam, flotsam, ligan, or wreck, brought or coming into Great Britain or Ireland, are subject to the same duties and entitled to the same drawbacks as liquors of the same kind regularly imported. And see Treasury letter as to stranded timber, Pope's Custom's Guide, p. 831, (14th ed.)||

In an action of trover, for the conversion of fourteen shirts, a night-gown, and a cap, a case was made for the opinion of the court. It was stated, that the plaintiff arrived at Dover from France, and brought the goods with him as his own wearing apparel, and not as merchandise or for sale; and that the defendant seized them for non-payment of duty. Upon the first argument, the court inclined strongly for the plaintiff; but a further argument was ordered. At another day the Attorney-General came into court, and said, that, it being stated particularly, that the goods were not imported as merchandise, it was too much for him to endeavour to support the seizure; but that, if it had stood only upon the words that he did not bring them in for sale, he would have endeavoured to have supported it.

Stra. 943, *Chapman v. Lamb*. ||Vide provision as to entering passengers' baggage, 6 G. 4, c. 107, § 77.||

[It has been adjudged, that ships taken as prize by a British man-of-war, are, upon sale, liable to the duty of 5*l.* per cent. *ad valorem* charged upon goods and merchandises by the statute of 12 Car. 2. But it was determined in this same case, that French made sails, belonging to a French ship so taken, were not chargable with the additional duty of 1*d.* an ell by 12 Ann. sess. 1, c. 16, and 19 Geo. 2, c. 27, for the plain intent of the provisions of these acts was, that British ships should be furnished with British sails; and if they used foreign made-sails, that the additional duty should be paid for them. But it would be absurd to extend them to the sails of foreign ships brought in by capture, which must be supposed to be furnished with sails of the manufacture of their own country.

Camplin v. Bullman, Parker, 198. The act of 34 G. 3, c. 70, exempts ships of war, and private ships, taken as prize, from the payment of any duty whatever.]

3. Of the Duties to which Aliens are liable.

Aliens are subject to some duties, which are not paid by natural-born subjects, or by persons naturalized by act of parliament.

By the 11 H. 7, c. 14, it is enacted, "That all merchants, strangers,

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and others, that be made denizens by the king's letters patent or otherwise, shall pay such customs and subsidies for their goods and merchandise, inwards and outwards, as they should have paid if such letters patent had never been made.

The practice of imposing extraordinary duties upon aliens is very ancient.

By the *charta mercatoria* aliens were liable to a higher duty upon wools, wool-fells, and leather exported, than natural-born subjects; and they were likewise to pay a duty of three pence in the pound upon all other goods imported except wine.

Rot. Chart. 31 E. 1, n. 44; 27 E. 3, c. 26; 2 Inst. 59.

12 E. 4, c. 3. In the reign of Edward the Third, the subsidy of tonnage was six shillings per ton upon the wine of aliens; whereas that of the English merchants was only half that sum; and the subsidy of poundage was two shillings upon the goods of aliens; whereas that of English merchants was only one shilling.

The extraordinary duties paid by aliens being heretofore, to distinguish them from the larger duties paid by English merchants as well as aliens, called *parvæ custumæ*, all extraordinary duties at this day paid by aliens are accounted for by the name of petty customs.

12 C. 2, c. 4. By the statute imposing the old subsidy of tonnage, aliens are to pay for some sorts of wine one-third, for others one-fourth, and for others one-fifth more duty than is paid by English merchants.

The same extraordinary duties of tonnage are imposed upon aliens, by the statutes imposing the further subsidy, the one-third subsidy, and two-thirds subsidy, as are imposed by the act granting the old subsidy.

9 and 10 W. 3, c. 23; 2 Ann. c. 9; 3 Ann. c. 5.

The duty of two shillings per ton, called butlerage, granted by *charta mercatoria*, is at this day to be paid by merchant strangers, upon all wine imported by them.

¶ Qu. Whether this is not repealed by 24 G. 3, sess. 2, c. 16.¶

By the statute imposing the old subsidy of poundage, it is enacted, (12 C. 2, c. 4,) "That of every twenty shillings value, of any of the native commodities of this realm, or manufactures wrought of any such commodities, to be carried out of this realm by any merchant alien, according to the value thereof in the book of rates hereinafter referred to or expressed, twelve pence in the pound shall be paid, over and above the subsidy of twelve pence in the pound to be paid by English merchants."

By the book of rates, art. 12, it is ordered, "That merchant-strangers, who according to the rates and values in this book contained, do pay double subsidy for lead, tin, and woollen cloth, shall also pay double custom for native manufactures of wool or part wool; and the said strangers are to pay upon all other goods, as well inwards as outwards, rated to the subsidy of poundage, three pence in the pound, or any other duty payable by *charta mercatoria*, besides the subsidy."

But by the 25 C. 2, c. 6, § 1, it is enacted, "That so much of such clauses of the statute of the twelfth year of our sovereign lord the king, that now is, and of the twelfth article of the book of rates therein mentioned, and of all other clauses contained in any other act or statute of this realm whatsoever, as do any ways concern any custom or subsidy upon any of the native commodities of this kingdom (except coals) or manufactures wrought or made in this kingdom or town of Berwick-upon-

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Tweed, to be exported out of this realm, payable by any merchant alien made denizen, or other stranger or alien, over and above the custom and subsidy payable by his majesty's natural-born subjects, be hereby repealed."

[By the statute of 24 G. 3, sess. 2, c. 16, it is enacted, that the *petty custom*, imposed by 12 Car. 2, c. 4, or additional duty on all the goods of aliens or strangers, shall cease, except the duties on goods imported or exported in any foreign ship or vessel, and except also those which had been granted to the city of London, called package and scavage.]

||By 6 G. 4, c. 111, § 26, it is enacted, "That to prevent frauds in colouring and concealing aliens' goods, all wines of the growth of France or Germany which shall be imported into any of the ports or places in England, Ireland, Wales, or town of Berwick-upon-Tweed, in any other ship or vessel than which doth truly and without fraud belong to England, Ireland, Wales, or the town of Berwick-upon-Tweed, and whereof the master and three-fourths at least of the mariners are English, shall be deemed alien goods, and pay all strangers' customs and duties to the town and port into which they shall be imported; and that all sorts of masts, timber, or boards, as also all foreign salt, pitch, tar, rosin, hemp, flax, raisins, figs, prunes, olive oils, all sorts of corn or grains, sugar, pot-ashes, spirits commonly called brandy, wine, or *aqua vitæ*, wines of the growth of Spain, the Islands of the Canaries, or Portugal, Madeira, or Western Islands, and all the goods of the growth, production, or manufacture of Muscovy or Russia which shall be imported into any of the ports or places in England, Ireland, Wales, or the town of Berwick-upon-Tweed, in any or other than such shipping, and so navigated, and all currants and Turkey commodities which shall be imported into any of the places aforesaid, in any other than English-built shipping, and navigated as aforesaid, shall be deemed aliens' goods, and pay accordingly to the town or port into which they shall be imported.

And by § 27, it is further enacted, "That every merchant or other passing any goods, wares, or merchandise, inwards or outwards, shall, by himself or his known servant, factor, or agent, subscribe one or more bill or bills of entry, whether such goods are on alien or British account, and, if required, make oath of the same before the officer appointed to receive the said duties (who is authorized by the charter granted to the *said* (a) mayor and commonalty and citizens to administer the same;) and no entry on alien account shall be permitted by the officers of the customs to pass, or the goods to be delivered, unless the signature or mark of the city collector or his deputy appears on the face of such warrant; and if any goods be entered on British account, which are *bonâ fide* aliens' property, the merchant or others entering the same shall forfeit and pay the sum of fifty pounds, to be recovered by action of debt, bill, plaint, or information and in any of his majesty's courts of record at Westminster, in the name of the chamberlain of the said city, on behalf of the said mayor and commonalty and citizens; and the damages so to be recovered shall be paid into the chamber of London for the use of the said mayor and commonalty and citizens."

(a) This *appears* to mean the mayor and commonalty of London.

4 G. 4, c. 77, § 1, intituled "An act to authorize his majesty, under certain circumstances, to regulate the duties and drawbacks on goods imported or exported in foreign vessels," &c., &c.

How goods imported and exported in foreign ships may pay duty, and have

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drawback as in British ships. It shall be lawful for his majesty, with the advice of his privy council, or by his order in council, to be published from time to time in the London Gazette, to authorize the importation into, or exportation from, the United Kingdom, or from any other of his majesty's dominions, of any goods which may be legally imported or exported in foreign vessels, upon payment of the like duties only, and with the like drawbacks, bounties, and allowances, as are charged or granted upon similar goods, when imported or exported in British vessels; provided always, that before any such order shall be issued, satisfactory proof shall have been laid before his majesty and his privy council, that goods imported into or exported from the foreign country in whose favour such remission of duties, or such drawbacks, bounties, or allowances shall be granted, are charged with the same duties, and are allowed the same drawbacks, bounties, or allowances, when imported into or exported from such foreign country in British vessels, as are levied or allowed on similar goods when imported or exported in vessels of such country.

§ 2. *How additional duties may be levied on goods imported in foreign vessels.* It shall be lawful for his majesty, with the advice of his privy council, or by his majesty's orders in council as aforesaid, whenever it shall be deemed expedient, to charge any additional duties of customs, or to withhold the payment of any drawbacks, bounties, or allowances, upon any goods imported into or exported from the United Kingdom, or imported into or exported from any of his majesty's dominions in vessels belonging to any foreign country in which higher duties shall have been levied, or smaller drawbacks, bounties, or allowances granted upon goods, when imported into or exported from such foreign country in British vessels, than are levied or granted upon similar goods, when imported or exported in vessels of such country; provided always, that such additional or countervailing duties and drawbacks, bounties, or allowances, shall not be of greater amount than may be deemed fairly to countervail the difference of duty, drawback, bounty, or allowance, paid or granted on goods imported into or exported from such foreign country in British vessels, more or less than the duties, drawbacks, bounties, or allowances there charged or granted upon similar goods imported into or exported from such foreign country in vessels of such country.

§ 4. *How duties may be removed, or again imposed.* His majesty, by the advice of his privy council, or by any orders in council as aforesaid, is hereby empowered to remove, or again to impose, any such additional or countervailing duty of customs, or to renew or withhold such drawbacks, bounties, or allowances, whenever it shall be deemed expedient so to do.

5 G. 4, c. 1, § 3. *Additional tonnage duties.* It shall be lawful for his majesty, with the advice of his privy council, or by his majesty's order in council, to be published from time to time in the London Gazette, (whenever it shall be deemed expedient,) to levy any additional or countervailing duty of tonnage upon any vessel which shall enter any of the ports in the United Kingdom of Great Britain and Ireland, or in any of his majesty's dominions, and which shall belong to any foreign country in which any duties of tonnage shall have been or shall be levied upon British vessels entering the ports of such country higher than are levied upon the vessels of such country; provided always, that such tonnage duties shall not be of greater amount than may be deemed to countervail the difference paid in

(E) Of prohibited Goods.

such foreign country upon the tonnage of British vessels more than the duty there charged upon the vessels of such country.

5 G. 4, c. 1, § 4. *Entry of foreign vessels on payment of like tonnage duties as on British vessels.* It shall be lawful for his majesty, with the advice of his privy council, or by his majesty's orders in council, to be published from time to time in the London Gazette, to permit and authorize the entry into any port of the United Kingdom of Great Britain and Ireland, or of any of his majesty's dominions, of any foreign vessel, upon payment of the like duties of tonnage only as are or may be charged upon similar British vessels: provided always, that before any such order shall be issued, satisfactory proof shall have been laid before his majesty and his privy council, that vessels of the foreign country in whose favour such permission shall be granted, are charged with no other or higher tonnage duties on their entrance into the ports of such foreign country than are levied on the entry into such ports upon the vessels of such country. ||

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β No duties as such can legally accrue upon the importation of prohibited goods. They cannot be entered at the custom-house, nor bonded.

McLane v. The United States, 6 Pet. 404.γ

As the offence of smuggling consists in bringing on shore or carrying from the shore of any goods, wares, or merchandise, which are by law prohibited to be brought on shore or carried from the shore, it will be proper to give some account of prohibited goods.

||See Pope's Customs Guide, (14th ed.)||

I. The exportation of some goods is prohibited entirely.

||By 6 G. 4, c. 107, § 99, it is enacted, That the several sorts of goods enumerated or described in the table following (denominated "A Table of Prohibitions and Restrictions Outwards") shall be either absolutely prohibited to be exported from the United Kingdom, or shall be exported only under the restrictions mentioned in such table, according as the several sorts of such goods are respectively set forth therein; that is to say,

1. *A Table of Prohibitions and Restrictions Outwards.*

"Clocks and watches; viz., Any outward or inward box, case, or dial-plate, of any metal, without the movement in or with every such box, case, or dial-plate, made up fit for use, with the clock or watchmaker's name engraven thereon.

"Lace; viz., Any metal inferior to silver, which shall be spun, mixed, wrought, or set upon silk, or which shall be gilt, or drawn into wire, or flatted into plate, and spun or woven, or wrought into or upon, or mixed with lace, fringe, cord, embroidery, tambour-work or buttons, made in the gold or silver lace manufactory, or set upon silk, or made into bullion spangles, or pearl, or any other materials made in the gold or silver lace manufactory, or which shall imitate or be meant to imitate such lace, fringe, cord, embroidery, tambour-work or buttons; nor shall any person export any copper, brass, or other metal which shall be silvered or drawn into wire, or flattened into plate, or made into bullion spangles, or pearl, or any other materials used in the gold and silver lace manufactory, or in imitation of such lace, fringe, cord, embroidery, tambour-work or buttons, or of any of the materials used in making the same, and which shall hold

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more or bear a greater proportion than three pennyweights of fine silver to the pound avoirdupois of such copper, brass, or other metal.

“*Any metal inferior to silver*, whether gilt, silver, stained or coloured, or otherwise, which shall be worked up or mixed with gold or silver, in any manufacture of lace, fringe, cords, embroidery, tambour-work or buttons.

“*Tools and utensils; viz., Any machine, engine, tool, press, paper, utensil or instrument used in or proper for the preparing, working, pressing or finishing of the woollen, cotton, linen or silk manufactures of this kingdom, or any other goods wherein wool, cotton, linen, or silk is used, or any part of such machines, engines, tools, presses, paper, utensils or instruments, or any model or plan thereof, or any part thereof, except wool cards, or stock cards, not worth above four shillings per pair, and spinners’ cards, not worth above one shilling and sixpence per pair, used in the woollen manufactures.*

“*Blocks, plates, engines, tools or utensils, commonly used in or proper for the preparing, working up or finishing of the calico, cotton, muslin or linen, printing-manufactures, or any part of such blocks, plates, engines, tools, or utensils.*

“*Rollers, either plain, grooved, or of any other form or denomination, of cast-iron, wrought-iron or steel, for the rolling of iron or any sort of metals, and frames, beds, pillows, screws, pinions, and each and every implement, tool or utensil thereunto belonging; rollers, slitters, frames, beds, pillows, and screws for slitting mills; presses of all sorts in iron and steel, or other metals, which are used with a screw exceeding one inch and a half in diameter, or any parts of these several articles, or any model of the before-mentioned utensils, or any part thereof; all sorts of utensils, engines or machines used in the casting or boring of cannon, or any sort of artillery, or any parts thereof, or any models of tools, utensils, engines or machines used in such casting or boring, or any part thereof; hand stamps, doghead-stamps, pulley-stamps, hammers and anvils for stamps; presses of all sorts, called cutting-out presses, beds, or punches, to be used therewith, either in parts or pieces, or fitted together; scoring or shading engines; presses for horn buttons; dies for horn buttons; rolled metal, with silver thereon; parts of buttons not fitted up into buttons, or in an unfinished state; engines for chasing, stocks for casting buckles, buttons, and rings; die-sinking tools of all sorts; engines for making button-shanks; laps of all sorts; tools for pinching of glass; engines for covering of whips; bars of metal, covered with gold or silver, and burnishing stones, commonly called blood-stones, either in the rough state or finished for use; wire moulds for making paper; wheels of metal, stone, or wood, for cutting, roughing, smoothing, polishing or engraving glass; purcellas, pincers, sheers and pipes used in blowing glass; potters’ wheels and lathes for plain, round, and engine turning; tools used by saddlers, harness-makers, and bridle-makers; viz., candle-strainers, side-strainers, point-strainers, creasing irons, screw creasures, wheel irons, seat irons, pricking irons, bolstering irons, clams and head knives; frames for making wearing apparel.*

“2. *A List of Goods which may be prohibited to be exported by Proclamation or Order in Council.*

“*ARMS, ammunition, and gunpowder.*

“*Ashes, pot and pearl.*

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“*Military stores* and naval stores, and any articles (except copper) which his majesty shall judge capable of being converted into, or made use of in increasing the quantity of military or naval stores.

“*Provisions* or any sort of victual which may be used as food by man.”

And if any goods shall be exported, or be waterborne to be exported, from the United Kingdom, contrary to any prohibitions or restrictions mentioned in such table in respect of such goods, the same shall be forfeited.

II. The importation of divers goods is prohibited entirely.

By 6 G. 4, c. 107, § 52, reciting, that it is expedient for the due encouragement of trade and manufactures, and for the security of the revenue, to prohibit or restrict the importation of certain goods, it is enacted, that the several sorts of goods enumerated or described in the table following, shall be either absolutely prohibited to be imported into the United Kingdom, or shall be imported only under the restrictions mentioned in such table, according as the several sorts of such goods are respectively set forth therein; that is to say,

3. *A List of Goods absolutely prohibited to be imported.*

ARMS, ammunition, and utensils of war, by way of merchandise; except by license from his majesty, for furnishing his majesty's public stores only.

Bandstrings; of silk, until the 5th July, 1826.(a)

Beef.(b)

Books; viz., first composed or written or printed in the United Kingdom, and printed or reprinted in any other country, imported for sale, except books not reprinted in the United Kingdom within twenty years; or being parts of collections, the greater part of which had been composed or written abroad.

Brocade of gold or silver buttons; until the 5th July, 1826.

Cattle, great; except 600 head yearly from and of the breed of the Isle of Man, into the port of Chester.(b)

Coin; viz., false money, or counterfeit sterling.

— silver of the realm, or any money purporting to be such, not being of the established standard in weight or fineness.

Cutwork; of silk, until the 5th July, 1826.(b)

Fish of foreign taking or curing, or in foreign vessels; except turbot and lobsters, stockfish, live eels, anchovies, sturgeon, botargo, and caviare.

Fringe; of silk, until the 5th July, 1826.(b)

Gloves, ditto.

Gunpowder; except by license from his majesty, such license to be granted for furnishing his majesty's stores only.

Lamb.(b)

Malt.

Mutton.(b)

Pork.(b)

Ribands, laces, and girdles, foreign made, whether wholly or partly of silk, until the 5th of July, 1826;(a) except ribands, laces, and girdles, brought by any persons as part of their dress.

Sheep.(b)

Snuff work.

(E) Of prohibited Goods. (*Imports.*)

Silks, (a) until the 5th of July, 1826; viz., wrought silks, Bengals and stuffs mixed with silk or herba, of the manufacture of Persia, China, or the East Indies.

Silks; Wrought silks, and silks mixed with gold, or other materials. (a)

— Wrought silks, velvets, crapes, and tiffanies, and any other work made thereof wholly or partly. (a)

— Silk stockings, foreign made, except stockings brought by any person for his or her private use. (a)

Spirits; viz., from the Isle of Man.

— Spirits of greater strength than one to nine over hydrometer proof, (b) except spirits the produce of the British possessions, or of the Cape of Good Hope.

Swine. (b)

Tobacco-stalks stripped from the leaf, whether manufactured or not.

Tobacco-stalk flour.

(a) These articles, of course, may now be imported. (b) By 7 G. 4, c. 48, § 6, so much of the above act as prohibits the importation of any spirits on account of the strength thereof, and also so much of the said act as prohibits the importation of beef, pork, or bacon, to be warehoused for exportation only, is repealed; and also so much of the above act as restricts in any way the importation of bonnets, hats, or plaiting of bass or straw, chip, cane, or horse-hair, and also of cambrics or lawns, and also of coffee, and also of or-molu, and also of China ware or porcelain, not being the produce of places within the limits of the East India Company's charter; and also any tobacco made up in rolls, being the produce of and imported from the state of Columbia, and in packages containing at least 320 lbs. of such rolls of tobacco, is repealed. By 7 & 8 G. 4, c. 56, § 3, so much of the above act 6 G. 4, c. 107, as prohibits the importation of beef and pork salted, not being beef or pork commonly called corned beef or pork, and also so much of the said act as prohibits the importation of cattle, sheep, swine, beef, lamb, mutton or pork, from the Isle of Man, being the produce of that island, is repealed.

4. *A List of Goods subject to certain Restrictions on Importation.*

BONNETS, hats, or platting of bass or straw, chip, cane, or horse-hair, proper for making such hats or bonnets; not being packed in bales or tubs, each of which shall contain seventy-five dozen of such hats, or 224 lbs. of such platting or other manufacture, at least.

Cambrics or lawns; not being in bales, cases, or boxes covered with sack-cloth or canvas, each of which shall contain 100 whole or 200 demi-pieces, and except into the port of London, and except by license from the commissioners of the customs.

China, goods from; unless by the East India Company, and into the port of London.

Chinaware or porcelain ware; except into the ports of London, Plymouth, Bristol, Liverpool, Hull, Newcastle, Leith, Greenock, Dublin, Cork, and Belfast.

Coffee; unless in packages, each of which shall contain 100 lbs. of neat coffees at least.

East India goods, of places within the limits of the East India Company's charter; unless in such ports as shall be approved of by the Lords of the Treasury, and declared by order in council to be fit and proper for such importation.

Hides, skins, horns, or hoofs, or any other part of cattle or beast; his majesty may by order in council prohibit, in order to prevent any contagious distemper.

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Or-molu ; viz., articles manufactured wholly or partly of *or-molu* ; except into the ports of London, Plymouth, Bristol, Liverpool, Newcastle, Hull, Leith, Greenock, Dublin, Cork, and Belfast.

Parts of articles ; viz., any distinct or separate part of any article not accompanied by the other part, or all the other parts of such article, so as to be complete and perfect, if such article be subject to duty according to the value thereof.

Spirits, not being perfumed or medicinal spirits ; viz., all spirits unless in ships of 70 tons or upwards.

— Rum of and from the British plantations, unless in casks containing not less than 20 gallons, or in cases containing not less than three dozen reputed quart bottles.

— All other spirits, unless in casks containing not less than 40 gallons, or in cases containing not less than three dozen reputed quart bottles.

Tea ; unless from the place of its growth, and by the East India Company, and into the port of London.

Tobacco and Snuff ; viz., unless in a ship of the burden of 120 tons or upwards.

— And unless in hogsheads, casks, chests, or cases, each of which shall contain, of neat tobacco or snuff, at least 100 lbs. if from the East Indies, or 450 lbs. if from any other place, and not packed in bags or packages within any such hogshead, cask, chest, or case, not separated nor divided in any manner whatever ; except tobacco of the dominions of the Turkish empire, which may be packed in inward bags or packages, or separated or divided in any manner within the outward package, provided such outward package be a hogshead, cask, chest, or case, and contain 450 lbs. net at least.

— And unless the particular weight of tobacco or snuff in each hogshead, cask, chest, or case, with the tare of the same, be marked thereon.

— And unless into the ports of London, Liverpool, Bristol, Lancaster, Cowes, Falmouth, Whitehaven, Hull, Port-Glasgow, Greenock, Leith, Newcastle-upon-Tyne, Plymouth, Belfast, Cork, Drogheda, Dublin, Galway, Limerick, Londonderry, Newry, Sligo, Waterford, and Wexford.

— But any ship wholly laden with tobacco may come into the ports of Cowes or Falmouth to wait for orders, and there remain fourteen days, provided due report of such ship be made by the master to the collector or comptroller of such port.

Wine ; viz., unless in a ship of the burden of 60 tons or upwards.

— And in casks containing not less than 21 gallons, or in cases containing not less than three dozen reputed quart bottles, or six dozen reputed pint bottles, except for private use, and with leave of the commissioners of customs.

And all goods from the Isle of Man, except such as be of the growth, produce, or manufacture thereof.

If any goods be imported into the United Kingdom contrary to any of the prohibitions or restrictions mentioned in such table in respect of such goods, the same shall be forfeited.||

The suffering of foreign manufactures to be worn in this kingdom must, by exhausting the treasure thereof, and depriving the poor of employment, be very detrimental ; but it may be for the benefit of trade to suffer such to be imported, provided they be again exported. Upon this principle,

(E) Of prohibited Goods.

divers of the manufactures of Persia and the East Indies are allowed to be imported: but it is provided, that they shall be deposited in such warehouses as are approved of by the proper officers of the customs; and that no part of the goods shall be taken thereout, until sufficient security be given that the same shall be exported to foreign parts, and not landed again in this kingdom.

||*Prohibited Goods may be warehoused for Exportation.*—By 6 G. 4, c. 107, § 53, any goods of whatsoever sort may be imported into the United Kingdom, to be warehoused under the regulations of any act in force for the time being for the warehousing of goods, without payment of duty at the time of the first entry thereof, or notwithstanding that such goods may be prohibited to be imported into the United Kingdom to be used therein, except the several sorts of goods enumerated or described in manner following; that is to say,—goods prohibited on account of the package in which they are contained, or the tonnage of the ship in which they are laden; tea and goods from China in any other than British ships, or by other persons than the East India Company; gunpowder, arms, ammunition, or utensils of war; dried or salted fish, not being stock-fish, beef, pork, or bacon,(a) infected hides, skins, horns, hoofs, or any other part of any cattle or beast; counterfeit coin or tokens; books first composed or written, or printed and published in the United Kingdom, and reprinted in any other country or place; copies of prints first engraved, etched, drawn, or designed in the United Kingdom; copies of casts of sculptures or models first made in the United Kingdom; clocks or watches impressed with any mark or stamp, appearing to be or to represent any legal British assay, mark, or stamp, or purporting, by any mark or appearance, to be of the manufacture of the United Kingdom, or not having the name and place of abode of some foreign maker abroad visible on the frame, and also on the face, or not being in a complete state, with all the parts properly fixed in the case.

(a) By 7 G. 4, c. 48, § 6, so much of the above act as prohibited beef, pork, or bacon to be warehoused for exportation only, is repealed.

Entry.—§ 54. If by reason of the sort of any goods, or the place whence, or the country or navigation of the ship in which any goods have been imported, they be such, or be so imported, as that they may not be used in the United Kingdom, they shall not be entered, except to be warehoused; and it shall be declared upon the entry of such goods, that they are entered to be warehoused for exportation only.||

For the further encouragement of trade and navigation, the person exporting prohibited goods is, in some cases, entitled to a drawback of the duties which were paid on the importation of the goods.

|| See Pope's Customs Guide, p. 242, (14th ed.)||

As one of the requisites necessary to entitle an exporter of prohibited goods to a drawback is a certificate from the proper officer of the customs that the duties were paid upon the importation of the goods, such goods are called certificate goods.

Such great improvements have been made in agriculture, that the corn produced in this kingdom is usually more than sufficient for the support of the inhabitants. It follows, that the exportation of corn must in the general be vastly advantageous to the whole nation, as well as to the land-owners. To promote this, and that it may be sent to foreign markets as

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cheap as the corn of other countries, it has been thought proper to allow a bounty, upon the exportation of divers kinds of grain, when the price of the grain does not exceed a certain sum.

||By 54 G. 3, c. 69, all duties of customs, and also all bounties respectively payable on the exportation of any corn, malt, meal or flour, from any part of the United Kingdom, and all restrictions upon the exportation thereof under any act of parliament in force in relation thereto, shall cease. And it shall be lawful for any person to export at all times from any part of the United Kingdom, any corn, grain, meal, malt and flour, without the payment of any duty of customs thereon, and no person shall be entitled to demand or receive any bounty for the exportation of any corn, grain, meal, malt or flour, from any part of the United Kingdom.

By 6 G. 4, c. 111, corn, grain, meal, malt, flour, biscuit, bran, grits, pearl barley, and Scotch barley, of the produce of the United Kingdom, are free of export duties.

As to the import duties on foreign corn, see 7 and 8 G. 4, c. 58. See Pope's Customs Guide, p. 98, *et seq.* (14th ed.)||

In some cases, for the sake of encouraging domestic manufactures, an allowance or premium is granted on the exportation thereof. This is not only done when they are made of foreign materials which have paid duties on importation, as in the case of wrought silks; but likewise, when they are made of native materials, as in the case of starch and divers other manufactures.

In all these instances, and in every other wherein a bounty or drawback is paid, or any debenture is made out for the payment of a bounty or drawback, upon the shipping of any goods for exportation, the re-landing of the goods is prohibited, in order to prevent the loss which the revenue would thereby sustain, and the injury which would thereby be done to the fair trader; and a bond is usually entered into, by the person who receives such bounty, drawback, or debenture, with condition, that the goods shall be carried into parts beyond the seas, and not landed again in this kingdom.

||See Pope's Customs Guide, p. 241, *et seq.* (14th ed.)||

(F) Of the pecuniary Penalties and Forfeitures incurred by Persons guilty of Smuggling, or of such practices as have a direct tendency thereto.

As the offence of smuggling is not complete unless some goods, wares, or merchandise are actually brought on shore or carried from the shore contrary to law, a person may be guilty of divers practices which have a direct tendency thereto, without being guilty of the offence.

For the sake of preventing or putting a stop to such practices, penalties and forfeitures are inflicted by divers statutes; and indeed it would be to no purpose, in a case of this kind, to provide against the end, without providing at the same time against the means of accomplishing it.

In treating of the penalties and forfeitures, to which persons guilty of such practices as have a direct tendency to this offence are liable, it is not intended to give an account of the penalties and forfeitures which are inflicted in every particular case. This would be going into a very large field; and it will sufficiently answer the present design to give a general account of such penalties and forfeitures.

The rule generally adhered to, in the statutes by which penalties and forfeitures are inflicted for offences against the laws relating to the customs, is, that one moiety of the money arising from such penalties and forfeitures

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shall be to the use of his majesty, his heirs and successors, the other moiety to the use of such person or persons as shall seize the smuggled or prohibited goods, or inform, sue, or prosecute for the same, by action, bill, plaint or information, in any of the courts of record at Westminster, or in the Court of Exchequer in Scotland : but in some few cases the application of the money is otherwise directed.

1. *In Ships at Sea or hovering upon the Coast.*

||By 6 Geo. 4, c. 108, § 1, from and after the 5th of January, 1826, this act, and all the provisions therein contained, shall have effect, and come into and be and continued in full force and operation, for the prevention of smuggling, and shall extend to any law in force, or hereafter to be made, relating to the revenue or management of the customs.

Vessels within certain distances on coasts with contraband goods not proceeding on voyage.—§ 2. If any vessel or boat belonging in the whole or in part to his majesty's subjects, or whereof one half of the persons on board the vessel or boat be subjects of his majesty, be found within four leagues of the coast of that part of the United Kingdom which is between the North Foreland on the coast of Kent, and Beachy-head on the coast of Sussex, or within eight leagues of the coast of any other part of the United Kingdom, or shall be discovered to have been within the said distances, not proceeding on her voyage, (a) wind and weather permitting, having on board or in any manner attached or fixed thereto, or having had on board or in any manner attached or affixed thereto, or conveying or having conveyed in any manner any goods whatsoever liable to forfeiture, by this or any other act relating to the revenue of customs, upon being imported into the United Kingdom ; then not only such goods, together with their packages, and all goods contained therein, but also the vessel or boat, together with all her guns, furniture, ammunition, tackle, and apparel, shall be forfeited ; provided, that such distance of eight leagues shall be measured in any direction between the southward and eastward of Beachy-head ; and the provisions of this act shall extend to such distance of eight leagues in every direction of Beachy-head, although any part of such limits may exceed the distance of four leagues from any part of the coast of Great Britain to the eastward of Beachy-head aforesaid.

(a) Under the repealed stat. 24 G. 3, c. 47, it was held, that a conviction for being found on board a vessel hovering, &c., with contraband goods, must negative that the vessel was proceeding on her voyage, and must state the defendant to be a British subject. *Ex parte Hawkins*, 2 Barn. & C. 31.

British vessels within 100 leagues of coast, with spirits, tobacco, or snuff, in illegal packages, or with implements for smuggling. (a)—§ 3. If any vessel or boat, not being square-rigged, belonging in the whole or part to his majesty's subjects, or whereof one half of the persons on board or discovered to have been on board the vessel or boat be subjects of his majesty, be found in any part of the British or Irish Channels, or elsewhere on the high seas, within 100 leagues of any part of the coast of the United Kingdom, or be discovered to have been within the said limits or distances, having on board or in any manner attached or affixed thereto, or conveying or having conveyed, in any manner, any brandy, or other spirits, in any cask or package of less size or content than 40 gallons, (excepting only for the use of the seamen then belonging to and on board such vessel

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or boat, not exceeding two gallons for each seaman,) or any tea exceeding 6 lbs. in the whole, or any tobacco or snuff in any cask or package whatever, containing less than 450 lbs., or packed separately in any manner within such cask or package, (except loose tobacco for the use of the seamen, not exceeding 5 lbs. for each seaman,) or any cordage or other article adapted and prepared for slinging small casks, or any casks or other vessels whatsoever, capable of containing liquids, of less size or content than 40 gallons, of the sort or description used, or intended to be used, or fit or adapted for the smuggling of spirits; or any materials for the forming, making, or constructing such casks or vessels, or any syphon, tube, hose, or implements whatsoever, for the broaching or drawing any fluid, or any articles or implements or materials adapted for the repacking tobacco or snuff, (unless the cordage or other articles as aforesaid are really necessary for the use of the vessel or boat, or are a part of the cargo of the vessel or boat, and included in the regular and official documents of the vessel or boat,) in such case the said spirits, tea, tobacco or snuff, together with the casks or packages containing the same, and the cordage and other articles, and also the vessel or boat, with all her guns, furniture, ammunition, tackle, and apparel therein, shall be forfeited.

(a) By 7 Geo. 4, c. 48, § 16, if any vessel or boat whatever arrive, or be found or discovered to have been within any port, harbour, river, or creek, of the United Kingdom, not being driven therein by stress of weather or other unavoidable accident, having on board or in any manner attached or affixed thereto, or having had on board or in any manner attached or affixed thereto, or conveying or having conveyed in any manner, within any such port, harbour, river, or creek, any brandy or other spirits, except rum, in any package of less size or content than 40 gallons, except only for the use of the seamen then belonging to and on board such vessel or boat, not exceeding two gallons for each seaman, or any tobacco or snuff in any package in which such tobacco or snuff could not be legally imported into the United Kingdom in such vessel, (except loose tobacco for the use of the seamen not exceeding 5 lbs. weight for each seaman,) every such vessel or boat, together with such spirits or tobacco, shall be forfeited; and every person found or discovered to have been on board such vessel or boat at the time of her becoming so liable to forfeiture, and knowing such spirits or tobacco to be or to have been on board, or attached to such vessel or boat, shall forfeit 100/., and shall be liable to detention and prosecution, and to be dealt with in the manner directed by the above act, in cases of persons found or discovered to have been on board vessels liable to forfeiture under that act; provided always, that, if it be made appear by proof on oath, to the satisfaction of the commissioners of customs, that the said spirits or tobacco were on board without the knowledge or privity of the owner or master of such vessel or boat, and without any wilful neglect or want of reasonable care on their or either of their behalfs, that then the vessel or boat shall not be liable to forfeiture, although the persons concerned in placing the spirits or tobacco on board, or knowing thereof, shall be liable to detention and prosecution as aforesaid.

Foreign vessels having been within certain distances of coast, having on board spirits, tea, or tobacco, in illegal packages.—§ 4. If any foreign vessel or boat, (not being square-rigged,) in which there shall be one or more subjects of his majesty, be found within four leagues of that part of the United Kingdom which is between the North Foreland on the coast of Kent, and Beachy Head on the coast of Sussex, or within eight leagues of any other part of the coast of the United Kingdom, to be measured as aforesaid, or shall be discovered to have been within the said distances, not proceeding on her voyage, wind and weather permitting, having on board or in any manner attached or affixed thereto, or having had on board or in any manner attached or affixed thereto, or conveying or having conveyed in any manner any brandy or other spirits, in any cask or package of less

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size or content than 40 gallons, (except only for the use of the seamen belonging to and on board such vessels, not exceeding two gallons for each seaman,) or any tea, exceeding 6 lbs. in the whole, or any tobacco or snuff in any cask or package whatsoever, containing less than 450 lbs., or packed separately in any manner within such cask or package, (except loose tobacco for the use of the seamen, not exceeding 5 lbs. for each seaman on board such vessel,) then such vessel or boat, with all her guns, furniture, ammunition, tackle, and apparel, shall be forfeited.

Foreign vessels at anchor, or hovering within one league of coast, having on board contraband goods.—§ 5. If any foreign vessel (a) whatsoever be found within one league of the coast of the United Kingdom, not proceeding on her voyage, wind and weather permitting, having on board or in any manner attached or fixed thereto, or having had on board or in any manner attached or fixed thereto, or conveying or having conveyed in any manner, within such distance, any goods whatsoever, liable to forfeiture by this or any other act relating to the revenue of customs, upon being imported into the United Kingdom, in such case the vessel, together with her guns, furniture, ammunition, tackle, and apparel, and all such goods laden therein, shall be forfeited.

(a) By 7 G. 4, c. 48, § 15, the like forfeiture, in similar cases, shall attach equally to any foreign boat, as fully and effectually as if in the said act such forfeiture had been made to attach to any foreign vessel or boat.

Throwing goods overboard during chase.—§ 6. Whenever any boat or vessel belonging, in the whole or a part, to his majesty's subjects, or whereof one half of the persons on board are subjects of his majesty, shall be found within four or eight leagues of the coast of the United Kingdom, as aforesaid, or be found as aforesaid in the British or Irish Channel, or elsewhere within 100 leagues of the coast of this kingdom, and chase shall be given, or signal made by any vessel in his majesty's service, or in the service of the revenue, hoisting the proper pendant and ensign, as hereinafter mentioned, in order to bring such vessel or boat to; if any person on board such vessel or boat shall, during the chase, or before such vessel or boat shall bring to, throw overboard the cargo or any part of the same, (unless through unavoidable necessity, or for the preservation of such vessel or boat having a legal cargo on board,) or shall stave or destroy any part of the cargo to prevent seizure thereof, in such case the vessel or boat, with all her guns, furniture, ammunition, tackle, and apparel, shall be forfeited.

Vessels from certain parts of Europe found at anchor, or found with spirits, tea, or tobacco, on board.—§ 7. If any vessel not being square-rigged, nor a galliot of not less than 50 tons burden, or any boat coming from Brest on the coast of France, or from any place between Brest on the coast of France and Cape Finisterre on the coast of Spain, including all islands on the coast of France and Spain, between those places, or coming from any place between the Helder Point on the coast of Holland and North Bergen on the coast of Norway, or from any place as far up the Cattegat as Gottenburg, including all the islands on the coast between those places, shall arrive in any of the ports of the United Kingdom, or shall be found at anchor or hovering within the limits of any of the ports thereof, and not proceeding on her voyage, wind and weather permitting, having on board for the use of the seamen then belonging to and on board such vessel or boat, any spirits exceeding one half gallon for each seaman, or having on board any tea, exceeding 4 lbs. in the whole, or having on

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board any tobacco, (excepting loose tobacco, not exceeding 2 lbs. for each seaman,) then not only all such goods, but also the vessel or boat, with all her materials, shall be forfeited.

Vessels from other parts of Europe at anchor, or hovering, with spirits, tea, or tobacco, on board.—§ 8. If any vessel not being square-rigged, nor a galliot of not less than 50 tons burden, or any boat coming from any place between Brest on the coast of France, and the Helder Point on the coast of Holland, including the Texel Isle, and all places on the Zuyder Zee, and all islands on the coast of France, the Netherlands, and Holland, between Brest and the Texel, shall arrive in any of the ports of the United Kingdom, or be found at anchor or hovering within the limits of any of the ports thereof, and not proceeding on her voyage, wind and weather permitting, having on board for the use of the seamen then belonging to and on board such vessel or boat, any spirits exceeding one half gallon for each seaman, or having on board any tea exceeding 2 lbs. in the whole, or having on board any tobacco, (excepting loose tobacco, not exceeding 1 lb. for each seaman,) then not only all such goods, but also the vessel or boat, with all her materials, shall be forfeited.

Vessels within certain distances of Guernsey, &c., having on board contraband goods.—§ 9. If any vessel or boat, whether British or foreign, be found or discovered to have been within one league of the islands of Guernsey, Jersey, Alderney, Sark, or Man, not proceeding on her voyage, wind and weather permitting, or within any bay, harbour, river, or creek, belonging to any one of the said islands, having on board or in any manner attached or affixed thereto, or having had on board or in any manner attached or affixed thereto, or conveying or having conveyed in any manner within the said last-mentioned distances or places, any goods which, by this or any other act relating to the revenue of customs, are liable to forfeiture, upon being imported into, or exported from, or carried coastwise into the said islands respectively, then the vessel or boat, with all her guns, furniture, ammunition, tackle, and apparel, and all such goods as aforesaid, with their packages and any other goods contained therein, shall be forfeited. ||

By 6 Geo. 1, c. 21, § 33, it is enacted, "That for the preventing of disputes, which may arise concerning the admeasurement of ships hovering on the coast, the following rule shall be observed therein; that is to say, take the length of the keel within board so much as she treads on the ground, and the breadth within board by the midship beam from plank to plank, and half the breadth for the depth, then multiply the length by the breadth, and that product by the depth, and divide the whole by ninety-four, and the quotient shall give the true contents of the tonnage; according to which rule the tonnage of all such ships or vessels shall be measured and ascertained; any law, custom, or usage to the contrary in any wise notwithstanding."

|| This appears not repealed by the general repealing act, 6 G. 4, c. 105. ||

|| *Persons found on board vessels liable to forfeiture or carrying smuggled goods.*—By 6 Geo. 4, c. 108, § 49, every person, being a subject of his majesty, who shall be found or discovered to have been on board any vessel or boat liable to forfeiture, under this or any other act relating to the revenue of customs, for being found within four or eight leagues of the coast of the United Kingdom as aforesaid, or for being found or discovered to have been within any of the distances or places in this act mentioned, from or in the United Kingdom, or from or in the Isle of Man, having on

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board or in any manner attached or affixed thereto, or having had on board or in any manner attached or affixed thereto, or conveying or having conveyed in any manner, such goods or other things as subject such vessel or boat to forfeiture, or who shall be found or discovered to have been on board any vessel or boat, from which any part of the cargo shall have been thrown overboard during chase, or staved or destroyed, shall forfeit 100*l.*; and every person, not being a subject of his majesty, who shall be found or discovered to have been on board any vessel or boat, liable to forfeiture for any of the causes aforesaid, within one league of the coast of the United Kingdom, or of the Isle of Man, or within any bay, harbour, river, or creek of the said island, shall forfeit for such offence the sum of 100*l.*; and it shall be lawful for any officer of the army, navy, or marines, being duly authorized and on full pay, or any officer of customs of excise, or other person acting in his aid, or duly employed for the prevention of smuggling, and they are hereby authorized and required to stop, arrest, and detain every such person, and to convey such person before two or more justices of the peace in the United Kingdom, or a governor, or deputy-governor, or deemster in the Isle of Man, to be dealt with as hereinafter directed: provided always, that any such person proving to the satisfaction of such justices, governor, deputy-governor, or deemster, that he was only a passenger in such vessel or boat, and had no interest whatever either in the vessel or boat, or in the cargo on board the same, shall be forthwith discharged by such justices.||

2. *In divers other Modes.*

|| *Vessels sailing from Guernsey, &c., with improper number of men, or taking on board implements for smuggling.*—6 G. 4, c. 108, § 10. If any vessel or boat, belonging wholly or in part to his majesty's subjects, or whereof half the persons on board are subjects of his majesty, shall sail from Guernsey, Jersey, Alderney, Sark, or Man, navigated by a greater number of persons than is allowed by this act, (as hereinafter mentioned,) in a vessel or boat of like size and description; or if any vessel or boat shall sail from any of the said islands, having on board, or which shall take or have on board during the voyage, any small cordage adapted for slinging small casks, or any more ankers, half ankers, or other small casks, or any tin or other cases, or bladders of less content than forty gallons, and capable of containing fluids, of the sort used for smuggling spirits, than shall be necessary for the use of such vessel, or any materials for making such small casks, cases, boxes, or bladders, or any syphon, tube, hose, or implement for broaching or drawing off any fluid, more than is usual and necessary for the fair and ordinary purposes of the voyage, or any articles, implements, or materials adapted for repacking tobacco or snuff on board during the voyage, such ship, vessel, or boat, with her guns, furniture, ammunition, tackle, and apparel shall be forfeited, together with all such articles as aforesaid.

Vessels sailing from Guernsey, &c., without a clearance.—§ 11. No vessel or boat belonging wholly or in part to his majesty's subjects, shall sail from Guernsey, Jersey, Alderney, Sark, or Man, without a clearance, whether in ballast or having a cargo, and if with a cargo, the master shall give bond to his majesty, in double the value of the vessel or boat and of the cargo, for duly landing the same at the port for which the vessel clears; and every such vessel or boat not having such clearance, or which, having a

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clearance for a cargo, shall be found light, or with any part of the cargo discharged before delivery thereof at the port specified in the clearance, (unless through necessity, or for the preservation of the vessel or boat, to be proved to the satisfaction of the commissioners of customs,) shall be forfeited.

Vessels from Guernsey, &c., having on board spirits, tobacco, snuff, tea, or wine, breaking bulk or unloading cargo.—§ 12. If after the departure from Guernsey, Jersey, Alderney, or Sark respectively of any vessel or boat belonging wholly or in part to his majesty's subjects, or whereof half the persons on board are his majesty's subjects, having on board any spirits, tobacco, snuff, tea or wine, bulk be broken, or any of the cargo unladen or unshipped, or any alteration made in the form, size, description, or number of packages shipped, or in the quantity, quality, or mode of package of the goods therein, at any time in the prosecution of the voyage, towards the United Kingdom or any other place to which the vessel or boat shall have cleared out, such vessel or boat, with her tackle and furniture, shall be forfeited; but no forfeiture shall be incurred for breaking the bulk, or unloading the cargo, or any part of it, through unavoidable necessity and distress, nor for any alteration of the cargo, if occasioned by necessity or accident, or made for the preservation and safety of the vessel or boat, such necessity or accident to be proved to the satisfaction of the commissioners of customs.

Vessels found within limits of port with a cargo, and afterwards found light and unaccounted for.—§ 13. If any vessel or boat whatever be found within the limits of any port of the United Kingdom with a cargo on board, and such vessel shall afterwards be found light, or in ballast, and the master is unable to give a due account of the place, within the United Kingdom, where such vessel shall have legally discharged her cargo, such vessel or boat, with her guns, furniture, ammunition, tackle, and apparel, shall be forfeited.

Hoisting flags in imitation of those used in his majesty's navy.—§ 15. If any person shall, from the 5th July, 1825, wear, carry, or hoist, in or on board any ship or boat whatever belonging to any of his majesty's subjects, whether the same be merchant or otherwise, without particular warrant for so doing from his majesty, or his high-admiral of Great Britain, or the commissioners for executing the office of high-admiral of Great Britain, his majesty's jack, commonly called the Union Jack, or any pendant, ensign, or colours usually worn by his majesty's ships, or any flag, jack, pendant, ensign, or colours, resembling those of his majesty, or those used on board his majesty's ships, or any other ensign or colours than the ensign or colours by any proclamation of his majesty now in force, or hereafter to be issued, prescribed to be worn, (a) in every such case the master or other person having charge thereof, or owners being on board the same, and every other person so offending, shall forfeit 50*l.*, which shall and may be recovered with costs of suit, and it shall be lawful for any officer of his majesty's navy, customs, or excise, to enter on board any such ship or boat, and to seize and take away any such prohibited flag, jack, pendant, ensign, or colours, and the same shall thereupon become forfeited to his majesty's use.

(a) By order in council, dated the 1st February, 1817, all vessels employed in the prevention of smuggling shall be allowed to wear a pendant with a red field, having a regal crown described thereon, at the upper part next the mast, and for an ensign a red jack, with a union jack in a canton at the upper corner thereof, next the staff, with a regal crown described in the centre of the red jack. By Admiralty warrant, dated July

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7, 1823, their lordships authorize all his majesty's subjects to hoist and use on and after this date, on board their vessels, for signals, as well for a pilot or otherwise, the signal jack, with an entire white border, such border being one-fifth of the breadth of the jack itself, exclusive of the border.

Unshipping or harbouring prohibited or uncustomed goods.—6 G. 4, c. 108, § 45. Every person not arrested and detained, as hereinafter mentioned, who shall, either in the United Kingdom or the Isle of Man, assist or be otherwise concerned in the unshipping of any goods which are prohibited, or the duties for which have not been paid or secured, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed, any goods which have been illegally unshipped without payment of duties, or which have been illegally removed without payment of the same, from any warehouse or place of security in which they may have been originally deposited, or shall knowingly harbour, keep, or conceal, or permit or suffer to be harboured, kept, or concealed, any goods prohibited to be imported, or to be used or consumed in the United Kingdom, or in the Isle of Man; and every person, either in the United Kingdom or the Isle of Man, to whose hands and possession any such uncustomed or prohibited goods shall knowingly come, shall forfeit either the treble value thereof, or the penalty of 100*l.*, at the election of the commissioners of his majesty's customs.

Unshipping drawback or bounty goods.—§ 46. If any goods upon which there is a drawback or bounty be shipped to be exported into parts beyond the seas, and afterwards be unshipped with intention to be re-landed in the United Kingdom, (unless in case of distress, to save the goods from perishing,) then the goods shall be forfeited, and the master of the vessel from which they shall be unshipped, and every person concerned in the unshipping, and the person to whose hands the same shall knowingly come, or who shall knowingly harbour, keep, or conceal, or suffer to be harboured, kept, or concealed, such goods, shall for every such offence forfeit treble value of the goods, or 100*l.*, at the election of the commissioners of customs.

Unshipping spirits or tobacco.—§ 50. Every person whatsoever, who shall unship, or be aiding or concerned in the unshipping of any spirits or tobacco, liable to forfeiture under this or any other act relating to the revenue of customs or excise, either in the United Kingdom or the Isle of Man, or who shall convey or conceal, or be aiding, or concerned in the conveying or concealing of any such spirits or tobacco, shall forfeit for such offence 100*l.*; and every such person may be detained by any officer of his majesty's army, navy, or marines, being duly authorized and on full pay, or any officer of customs or excise, or other person acting in his aid, or duly employed for the prevention of smuggling, and taken before two justices of the peace in the United Kingdom, or a governor, or deputy-governor, or deemster, in the Isle of Man, to be dealt with as hereinafter directed.(a)

(a) By 7 & 8 G. 4, c. 56, s. 5, all spirits or tobacco which shall be found being removed or carried without a legal permit for the same, shall be deemed to be spirits or tobacco unshipped without payment of duty, unless the party in whose possession the same shall be found or seized shall prove to the contrary.

Vessels and boats used in removal of goods.—9 G. 4, c. 108, § 16. All vessels and boats made use of in the removal, carriage, or conveyance of any goods liable to forfeiture under this or any other act relating to the revenue of customs, shall be forfeited.

Uncustomed, prohibited, or warehoused goods removed illegally.—§ 32.

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If any goods liable to the payment of duties be unshipped from any vessel or boat, (custom and other duties not being first paid or secured,) or if any prohibited goods whatsoever be imported into any part of the United Kingdom, or if any goods whatsoever, which shall have been imported, warehoused or otherwise secured in the United Kingdom, either for home consumption or for exportation, be clandestinely or illegally removed from or out of any warehouse or place of security, then all such goods shall be forfeited, together with all horses or other animals, and all carriages and other things made use of in the removal of such goods.

Prohibited goods shipped or brought to quay.—§ 33. If any goods which are or may be prohibited to be exported be put on board any vessel or boat, with intent to be laden or shipped for exportation, or shall be brought to any quay, wharf, or other place in the United Kingdom, in order to be put on board any vessel or boat, for the purpose of being exported, or if any goods which are prohibited to be exported be found in any package produced to the officers of the customs, as containing goods not so prohibited, then not only all such prohibited goods, but also all other goods packed therewith, shall be forfeited.

Signals to smugglers.—§ 52. No person shall, after sunset and before sunrise, between the 21st of September and the 1st of April, or after the hour of eight in the evening and before the hour of six in the morning at any other time in the year, make or assist in making, or be present for the purpose of assisting in the making of any light, fire, flash or blaze, or any signal by smoke, or by any rocket, fire-works, flags, firing of any gun or other fire-arms, or any other contrivance or device, or any other signal, (a) in or on board, or from any vessel or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coast or shore, for the purpose of making or giving any signal to any person on board any smuggling vessel or boat, whether any person so on board any such vessel or boat be or be not within distance to see or hear any such light, fire, flash, blaze or signal; and if any person, contrary to the true intent and meaning of this act, make or cause to be made, or assist in making any such light, fire, flash, blaze or signal, such person so offending shall be guilty of a misdemeanor; and it shall be lawful for any person to stop, arrest, and detain the person who shall so make or assist in the making, or who shall be present for the purpose of assisting in making any such light, fire, flash, blaze or signal, and to convey any such person before two or more of his majesty's justices of the peace, residing near the place where such offence shall be committed, who, if he see cause, shall commit the offender to the next county jail, there to remain until the next court of oyer and terminer, great session, or jail delivery, or until such persons shall be delivered by due course of law; and it shall not be necessary to prove, on any indictment or information, that any vessel or boat was actually on the coast; and the offender being duly convicted thereof shall, by order of the court before whom such offenders shall be convicted, either forfeit the penalty of 100*l.*, or, at the discretion of such court, be committed to the common jail or house of correction, there to be kept to hard labour for any term not exceeding one year.

(a) *Signals.*—By 7 G. 4, c. 48, § 19, every intimation to any smuggling vessel or boat, in whatever manner given, shall be deemed to be a signal within the meaning of the said act for the prevention of smuggling, and shall subject the person giving such intimation to be detained and proceeded against as directed by the said act. *Proof of*

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orders upon trials.—By § 20, upon the trial of any issue, or upon any judicial hearing or investigation, touching any penalty or forfeiture under any law relating to the revenue of customs or excise, or to the law of navigation, where it may be necessary to give proof of any order issued by the commissioners of his majesty's treasury, or by the commissioners of customs or excise respectively, the letter or instructions which shall have been officially received by the officer of customs or excise, at the place or district where such penalty or forfeiture shall have been incurred, or shall be alleged to have been incurred, for his government, and in which such order is mentioned or referred to, and under which instructions he shall have acted as such officer, shall be admitted and taken as sufficient evidence and proof of such order, to all intents and purposes whatsoever.

Proof of not making signals.—§ 53. In case any person be charged with, or indicted for having made or caused to be made, or been assisting in making, or been present for the purpose of making or assisting in making, any such fire, light, flash, blaze or other signal, the burden of proof that such fire, light, flash, blaze, noise or other thing, so charged as having been made with intent and for the purpose of giving such signal, was not made with such intent and for such purpose, shall be upon the defendant against whom such charge is made, or such indictment is found.

How lights for signals may be put out.—§ 54. It shall be lawful for any person whatsoever to put out or prevent any such light, fire, flash, or blaze, or any smoke, signal, rocket, firework, noise or other device or contrivance, made or being made as aforesaid, and to enter and go upon any lands for that purpose, without being liable to any indictment, suit or action for the same.

Resisting officers.—Rescuing or destroying goods.—§ 55. If any person whatsoever hinder, oppose, molest or obstruct any officer of the army, navy, or marines, being duly authorized and on full pay, or any officer of customs or excise, in the execution of his duty, or in the due seizing of any goods liable to forfeiture by this or any act relating to the revenue of customs, or any person acting in his aid, or duly employed for the prevention of smuggling, or rescue or cause to be rescued, any goods which have been seized, or shall attempt or endeavour to do so, or shall before, or at, or after any seizure, stave, break, or otherwise destroy any goods, to prevent the seizure thereof, or the securing the same, then the parties offending shall forfeit for every such offence 200*l*.

Spirits floating on the sea.—§ 70. No person whatsoever being a subject of his majesty, other than an officer of the navy, customs, or excise, or some person authorized in that behalf, shall intermeddle with or take up any spirits, being in casks of less content than forty gallons, which may be found floating upon or sunk in the sea; and if any spirits be taken up, or be found or discovered on board any vessel or boat belonging as aforesaid, within the limits of any part within the United Kingdom, or Isle of Man, or within the distances in this act before mentioned, the vessel or boat on which the same shall be found or discovered, together with such spirits, shall be forfeited, and the person in whose custody the same shall be found shall forfeit the penalty of treble the value of such spirits, or 50*l*. at the election of the commissioners of customs.

When suits to be commenced.—6 G. 4, c. 108, § 77. All suits, indictments, informations, exhibited for any offence against this or any other act, relating to the revenue of customs, in any of his majesty's courts of record at Westminster, or in the Courts of Exchequer in Scotland or in Dublin, or in the Royal Courts of Guernsey, Jersey, Alderney, Sark, or Man, shall and may be had, brought, sued or exhibited within three years next after

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the date of the offence committed; and shall and may be exhibited before any two or more justices of the peace or governor, deputy-governor, or deemster in the Isle of Man, within six months next after the date of the offence committed.

On whom onus probandi to lie.—§ 102. If any goods be seized for non-payment of duties or any other cause of forfeiture, and any dispute shall arise whether the customs, excise, or inland duties have been paid for the same, or the same have been lawfully imported, or concerning the place whence such goods were brought, then the proof thereof shall lie on the owner or claimer of such goods, and not on the officer who shall seize the same.

Goods concealed in double sides or false bottoms.—7 and 8 G. 4, c. 56, § 12. If any goods which are subject to any duties or restriction in respect of importation be found, on examination of any package, to be concealed in double sides or false bottoms, or in any other secret or disguised place in such package, or among any other things in such package, then not only all such goods, but also all other goods found in the said package, shall be forfeited.

Certain vessels and boats to be licensed.—6 G. 4, c. 108, § 20. All vessels belonging in the whole or in part to any of his majesty's subjects, (unless square-rigged,) and all vessels whatsoever, belonging as aforesaid, the length of which shall be greater than in the proportion of three feet to one foot in breadth; and all vessels belonging as aforesaid, armed for resistance (otherwise than is hereinafter provided;) and all boats whatsoever, belonging as aforesaid, which shall be found within any of the limits or distances as aforesaid, shall be forfeited, unless the owner thereof shall have obtained a license for navigating the same from the commissioners of customs, as hereinafter directed.(a)

(a) By 7 G. 4, c. 48, § 12, no license (except a license for arming) shall be required under the above act, for any vessel which is of the burden of two hundred tons, or upwards, nor for any square-rigged vessel, or any vessel or boat propelled by steam, which is not of greater length than in the proportion of three feet six inches to one foot of breadth; and no greater or other security shall be required on account of any license to be issued under the above act, than in the sum of 1000*l.*, or in the single value of the vessel or boat for which such license is to be issued, if such value be less than 1000*l.*, and by the sole bond of such owner or owners of such vessel or boat; provided, that if any such bond be taken of the owner of any boat who shall not have attained the age of twenty-one years, such bond shall nevertheless be valid and effectual to all intents and purposes.

Cancelling of bonds.—§ 13. No bond given on account of the license of any vessel or boat, under the above act, shall be cancelled until the space of twelve months after the license for which such bond had been entered into shall be given up to the proper officer of customs; and such bond shall remain in full force for the time of twelve months after the delivering the license as aforesaid, unless fresh security shall be given for such vessel or boat.

Goods liable to forfeiture as well as vessels.—§ 14. In case any vessel shall, on account of any goods, become liable to forfeiture under the said act for the prevention of smuggling, the goods creating such forfeiture shall also be forfeited.||

[On the old acts it was held, that if a vessel, having a license to go to any particular port, or to navigate within any particular limits, go out of those limits, she abandons her license, and may be seized on her return, as having no license.

Attorney-General v. Brown, Anstr. 720.

It should seem, that a license to a vessel generally, "*to be employed in the coasting trade,*" is not good. But, if a vessel has obtained a license to

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navigate to a particular place, or within certain limits, it is not the practice, if she makes another voyage to the same place or within the same limits, to require a fresh license.

Anstr. 23, 724.]

Heretofore goods could only be shipped and unshipped in the great ports; for by 4 H. 4, c. 20, it is enacted, "That all manner of merchandise entering into the realm of England, or going out of the same, shall be charged and discharged in the great ports of the sea, (a) and not in creeks or small arrivals, upon pain to forfeit all the merchandise so charged or discharged to our lord the king; except vessels arriving in such little creeks and arrivals by coercion of tempest of the sea."

[(a) These limitations, being contrary to the liberty and *jus publicum* of ports, could not be imposed without an act of parliament. Hale, De Port. Maris, 100.]

The great ports of England, which are at other times called the ancient or head-ports, are London, Ipswich, Yarmouth, Lynn, Boston, Hull, Newcastle, Berwick, Carlisle, Chester, Milford, Cardiff, Gloucester, Bristol, Bridgwater, Plymouth, Exeter, Poole, Southampton, Chichester, and Sandwich.

[Besides the ports here mentioned, there are customers and comptrollers in the several ports following, viz., Feversham, Rochester, Dover, Rye, Weymouth, Lyme, Dartmouth, Barnstable, Minehead, Aberdowry, Liverpool, Presull, Colchester.]

By 6 Ann. c. 28, § 18, it is enacted, "That for the better and more effectual ascertaining of the ports, members, creeks, and havens in Scotland, where goods have been or may be exported and imported, and the several quays, wharfs, and other places, where the same may be put on board any vessel for transportation, or be unladen upon importation, the queen's majesty, her heirs and successors, shall and may from time to time, by commission or commissions out of the Court of Exchequer in Scotland, appoint all such further places, ports, members, and creeks, in Scotland, as shall be lawful for the landing and discharging, lading or shipping, of any goods, wares or merchandises, in Scotland, and to what ancient and head-ports respectively such places, members, and creeks shall respectively appertain; after which appointment so made, the ports, members and creeks, so appointed, shall be subject to and under such regulations, as the like ports, members, and creeks, appointed in England for exportation or importation there, are or ought to be by the laws of England."

It is enacted by the 22 G. 2, c. 33, § 2, art. 18, "That if any captain, commander, or other officer of any of his majesty's ships or vessels shall receive on board, or permit to be received on board, such ship or vessel, any goods or merchandise other than for the sole use of the ship or vessel, except gold, silver, or jewels, and except the goods and merchandises belonging to any merchant or other ship or vessel, which may be shipwrecked, or in imminent danger of being shipwrecked, either on the high seas, or in any creek, port, or harbour, in order to the preserving them for their proper owners, and except such goods or merchandises as he shall at any time be ordered to take and receive on board, by order of the Lord High Admiral of Great Britain, or the commissioners for executing the office of lord high admiral, for the time being, every person so offending, being convicted thereof by a sentence of a court-martial, shall be cashiered, and be for ever afterwards rendered incapable to serve in any place or office in the naval service of his majesty, his heirs and successors."

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And by § 24, after reciting that, by an act for the more effectual suppressing of piracy, it is amongst other things enacted, that the captain, commander, or other officer, of the said ship or vessel of war, and all and every the owners and proprietors of such goods and merchandises put on board such ship or vessel of war as aforesaid, shall lose, forfeit, and pay, the value of all and every such goods and merchandises so put on board as aforesaid, it is enacted, "That if any captain, commander, or other officer, of any of his majesty's ships or vessels, shall receive on board, or permit or suffer to be received on board such ship or vessel any goods or merchandises, contrary to the true intent and meaning of the eighteenth article in this act before mentioned, and hereby enacted, every such captain, commander, or other officer, shall, for every such offence, over and above any punishment inflicted by this act, forfeit and pay the value of all and every such goods and merchandises so received, or permitted or suffered to be received on board as aforesaid, or the sum of five hundred pounds of lawful money of Great Britain, at the election of the informer or person who shall sue for the same, so that no more than one of these penalties or forfeitures shall be sued for or recovered, by virtue of this and the said in part recited act, or either of them, against the same person, for one and the same offence."

In a case reserved, in an action for the penalty of one hundred pounds, ||under 22 G. 2, c. 36,|| for bringing in foreign embroidery, it was stated, that the defendant, whilst he was in France, had worn an embroidered waistcoat, which was made in France; and that this waistcoat was brought over in his portmanteau when he came to England. The question was, Whether he were liable to the penalty inflicted by the 22 G. 2? It was holden that he was not; and by Lord Mansfield, C. J., the intention of that statute was to prevent the bringing in of foreign embroidery for sale, and not to hinder a gentleman from bringing in his wearing apparel. If the defendant were liable in this case to the penalty, the waistcoat might have been seized in his portmanteau; and if it could have been seized in his portmanteau, it might have been taken off his back; the consequence of which would be, that any person, even a foreigner, coming from a foreign part, might be stripped naked as soon as he sets his feet on the British shore.

MS. Rep. 83, *Dyson qui tam v. Lord Villiers*, East, 13 G. 3, in K. B.

(G) Of the corporal Punishments to which Persons who have been guilty of Smuggling, or of such Practices as have a direct Tendency thereto, are liable.

||*Persons armed assembled to assist in illegal exportation or landing.*— 6 G. 4, c. 108, § 56. If any persons to the number of three or more, armed with fire-arms or other offensive weapons, (a) shall, within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be assembled (b) in order to be aiding and assisting in the illegal exportation of any goods prohibited to be exported, or in the carrying of such goods in order to exportation, or in the illegal landing, running, or carrying away, of prohibited or uncustomed goods, or goods liable to pay any duties which have not been paid or secured, or in the illegal carrying of any goods from any warehouse or other place, as shall have been deposited therein, for the security of the home-consumption duties thereon, or for preventing the use or consumption thereof in the United Kingdom, or in the illegal relanding of any goods which shall have been exported upon debenture or certificate, or in rescuing or taking away any such goods after seizure, from the officer of customs,

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or other officer authorized to seize the same, or any person employed by them, or from the place where the same shall have been lodged by them, or in rescuing any person who shall have been apprehended for any of the offences made felony by this or any act relating to the revenue of customs, or in the preventing the apprehension of any person who shall have been guilty of such offence; or in case any persons, to the number of three or more, so armed, shall, within this kingdom, or within the limits of any port, harbour, or creek thereof, be so aiding, every person so offending, and every person aiding and abetting, or assisting therein, shall, being thereof convicted, be adjudged guilty of felony, and suffer death as a felon without benefit of clergy.

(a) As to what were held *offensive weapons* under the repealed statute, 19 G. 2, c. 34, the words of which were similar to those of this section, see 1 Russ. on Crim. 124, (2d ed.) A person catching up a hatchet accidentally in the hurry, was held not armed with an offensive weapon within the statute, Rose's Ca., 1 Leach, 342, note; and so also as to large sticks with knobs, Ince's Ca., Ibid.; so also as to a common whip, 1 Leach, 23. It seems that if a person is assembled with others who are armed and active, it is not necessary that such individual should be armed. 1 Leach, 255; and see Rex v. Smith, Russ. and Ry. 368.

(b) On the 19 G. 2, c. 34, it was held that the *assembling* must be *deliberate*, and for the purpose of committing the offence described in the statute. 1 Leach, 343; and see 1 Russ. on Crim. 125.

Shooting at boats belonging to navy or customs.—§ 57. If any person maliciously shoot at or upon any vessel or boat belonging to his majesty's navy, or in the service of the revenue in any part of the British or Irish Channels, or elsewhere on the high seas, within one hundred leagues of any part of the United Kingdom, or maliciously shoot at, maim, or dangerously wound, any officer of the army, navy, or marines, being duly authorized and on full pay, or any officer of customs or excise, or any person acting in his aid, or duly employed for the prevention of smuggling, in the due execution of his office or duty, every person so offending, and every person aiding or abetting therein, shall, being lawfully convicted, be adjudged guilty of felony, and shall suffer death as a felon without benefit of clergy.(a)

(a) On the repealed statute, 52 G. 3, c. 143, § 11, it was determined that where a Custom-house vessel had chased a smuggler and fired into her without hoisting the pendant and ensign then required by statute, the returning such fire was not malicious. Rex v. Reynolds, Russ. and Ry. C. Ca. 465.

Persons armed or disguised, passing with goods liable to forfeiture.—6 G. 4, c. 108, § 58. If any person, being in company with more than four other persons, be found with any goods liable to forfeiture under this or any other act relating to the revenue of customs or excise, or in company with one other person within five miles of any navigable river, carrying offensive arms or weapons, or disguised in any way, every such person shall be adjudged guilty of felony, and shall, on conviction of such offence, be transported as a felon for the space of seven years; and if such offender shall return before the expiration of the seven years, he shall suffer as a felon, and have execution awarded against him as a person attainted of felony, without benefit of clergy.

Assaulting officer.—§ 59. If any person by force or violence assault, resist, oppose, molest, hinder, or obstruct any officer of the army, navy, or marines, being duly authorized and on full pay, or any officer of customs or excise, or other person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his duty

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or office, such person being thereof convicted shall be adjudged a felon, and shall be transported for seven years, or sentenced to be imprisoned in any house of correction or common jail, and kept to hard labour, for any term not exceeding three years, at the discretion of the court before whom the offender shall be tried and convicted as aforesaid.

How persons detained for smuggling offences to be dealt with.—§ 80. It shall be lawful for any two or more justices of the peace, or governor, deputy-governor, or deemster as aforesaid, before whom any person liable to be arrested and detained, who shall have been arrested and detained for being found or discovered to have been on board any vessel or boat liable to forfeiture under this or any other act relating to the revenue of customs, or for unshipping, carrying, conveying, or concealing, or aiding or being concerned in unshipping, carrying, conveying, or concealing any spirits or tobacco liable to forfeiture under this or any such act, shall be carried, on the confession of such person of such offence, or on any proof thereof, on the oaths of one or more credible witness or witnesses, to convict such person of any such offence; and every such person so convicted shall immediately after such conviction pay into the hands of such justices, &c., for the use of his majesty, the penalty of 100*l.*, without any mitigation whatever, for any such offence of which he shall be so convicted; or, in default thereof, the justices, &c., shall by a warrant commit such person to any jail or prison, there to remain until such penalty be paid; provided that, if the person convicted of any such offence be a seaman or seafaring man, and fit and able (*a*) to serve his majesty in his naval service, and shall not prove that he is not a subject of his majesty, it shall be lawful for any such justices, &c., and they are hereby required, in lieu of such penalty, by warrant to order any officer of the army, navy, or marines, being duly authorized and on full pay, or officer of customs or excise, to convey, or cause to be conveyed, such person on board any of his majesty's ships, in order to his serving his majesty in his naval service for the term of five years; and if such person shall at any time within that period, by any means escape or desert from such custody or service, he shall be liable at any time afterwards to be again arrested and detained, by any officer of customs, or any other person, and be delivered over as aforesaid to complete his service of five years: provided always, that it be made to appear to any such justices, &c., that convenient arrangement cannot be made at the time of the conviction of the party, for immediately conveying such seaman or seafaring man, so convicted, on board any of his majesty's ships in order to serve his majesty, it shall be lawful for any such justices, &c., to commit any such seaman or seafaring man, so convicted, to any prison or jail, there to remain in safe custody for any period not exceeding one month, in order that time may be given to make arrangements for so conveying such seaman or seafaring man on board any of his majesty's ships as aforesaid; provided also, that the commissioners of the treasury shall have full power to remit or mitigate any such penalty, punishment, or service, whether the parties be seafaring men or otherwise.

(*a*) By 7 & 8 G. 4, c. 46, § 4. If any person be proceeded against under the above act, or this or any other act now in force or hereafter to be made for the prevention of smuggling, or relating to the revenue of customs or excise, and the information exhibited against such person shall charge him as being a seaman and fit and able to serve his majesty in his naval service, and it shall appear to the justices before whom such person is brought, that he is guilty of the offence with which he is charged, but that he is not fit for his majesty's naval service, then such justices are hereby required to

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amend such information accordingly, and to convict such person in the penalty of 100*l.*, as if proceeded against as not being a seaman or fit for his majesty's naval service.

How persons arrested for certain offences may be detained.—6 G. 4, c. 108, § 83. Where any person shall have been arrested and detained by any officer of the army, navy, or marines, being duly authorized and on full pay, or any officer of customs or excise, or any person acting in his aid, or duly employed for the prevention of smuggling, for any offence under this or any other act relating to the revenue of customs, and shall have been taken and carried before any two justices of the peace, to be dealt with according to law, if it appear to such justices, that there is reasonable cause to detain such person, such justices may order such person to be detained a reasonable time, as well before as after any information has been exhibited against such party; and, at the expiration of such time, such justices may proceed finally to hear and determine the matter.

What officers of army, navy, or marines, or preventive service authorized to act.—§ 106. In all cases where any power or protection is given by this act to any officer of the army, navy, or marines, the same shall not extend to any officer, unless on full pay, and employed for the prevention of smuggling, under the proper authority to which such officer is subjected, or under the authority of the commissioners of customs or excise, and such officer shall be deemed to be duly authorized for the purpose of any act relating to the revenue of customs.

How vessels not bringing to, during chase, may be fired at.—Indemnity to officers.—6 G. 4, c. 108, § 14. In case any vessel or boat, liable to seizure or examination under any act or law for the prevention of smuggling, shall not bring to on being required so to do, on being chased by any vessel in his majesty's navy, having the proper pendant ensign of his majesty's ships hoisted, or by any vessel employed for the prevention of smuggling, under the authority of the lords commissioners of the admiralty, or the commissioners of customs, having a pendant and ensign hoisted, of such description as his majesty by any order in council, or by his royal proclamation under the great seal of the United Kingdom, shall have directed, or shall from time to time in that behalf direct, it shall be lawful for the captain, master, or other person having the command of such vessel in his majesty's navy, or employed as aforesaid, (first causing a gun to be fired as a signal,) to fire at or into such vessel or boat; and such captain, &c., is hereby indemnified and discharged from any indictment, penalty, or action for damages for so doing; and, in case any person be wounded, maimed, or killed by any such firing, and the captain, &c., be sued, molested or prosecuted, or brought before any of his majesty's justices of the peace, or other justices, or persons having competent authority, for such firing, wounding, maiming, or killing, every such justice or person is hereby authorized and required to admit every such captain, &c., to bail.

How and where commanding officers may haul their vessels on shore.—§ 60. It shall be lawful for the commanding officer, for the time being, of any vessel or boat employed for the prevention of smuggling, to haul any such vessel or boat upon any part of the United Kingdom, or the shores, banks, or beaches of any river, creek, or inlet of the same, (not being a garden or pleasure-ground, or place ordinarily used for any bathing machine,) which shall be deemed most convenient for that purpose; and

to moor any such vessel or boat on such part of the aforesaid coasts, shores, banks, and beaches, below high water-mark, and over which the tide flows on ordinary occasions; and to continue such vessel or boat, so moored; for such time as the commanding officer shall deem necessary and proper; and such commanding officer, or such person acting under his direction, shall not be liable to any indictment, action, or suit for so doing.

How officers wounded in the service and their families to be provided for.—§ 61. In all cases where any officer or seaman employed in the service of the customs or excise shall be killed, maimed, wounded, or in any way injured in the due execution of his office, or if any person acting in his aid be so killed, maimed, wounded, or in any way injured while so aiding such officer and seaman, it shall be lawful for the commissioners of customs and excise, respectively, to make such provision for the officer or person so maimed, wounded or injured, or for the widows and families of such as shall be killed, as they shall be authorized to do by warrant from the commissioners of the treasury.||

Harvey, who had been committed for not surrendering himself pursuant to the directions of 19 Geo. 2, c. 34, § 2, being brought into the Court of King's Bench by a *habeas corpus*, it was agreed by the court, that a suggestion containing all the facts should be entered upon the roll; and by Lee, C. J.—It is necessary that all the facts should in this case appear to the court upon record; it not being like the case of an attainder by act of parliament, in which the facts are settled, the person named, and the only question is, Whether the prisoner be the identical person attainted? In a suggestion entered by the attorney-general, it was, among other facts to bring the prisoner within this statute, averred, that he had been guilty of an offence, provided against by this statute, at Benacre, in the county of Suffolk; and that the sheriff did, within fourteen days after the receipt of the order of council, cause the same to be proclaimed, between the hours of ten in the morning and two in the afternoon, in the respective market places, upon the respective market days, of two market towns, but neither of them was named in the suggestion, in the county of Suffolk, the said two market towns being near to the place where the offence was committed. Ford, of counsel for the prisoner, objected to the two market towns not being named in the suggestion; but it being ruled, that, if the prisoner had any objection to the suggestion, he must demur to it, he gave up this objection, and prayed time to plead till next term. As to this, the opinion of the court was—That the prisoner ought to plead *instantly*, as is done in indictments; and by Foster, J.—If this court should give a term to plead in, it will be expected that justices of jail-delivery, to whom the same power is given by this statute as is given to this court, should give time to plead till the next assize. Hereupon the prisoner denied all the facts he was charged with; and the attorney-general affirmed them, joined issue, and prayed that a *venire* might be awarded. Ford desired to have a copy of the suggestion; but the court, who told him he might hear it read again, refused to grant this. A *venire* was awarded, and it was agreed by the court, that the proceedings should be in the same manner as before justices of jail-delivery. In the next term the prisoner was brought to the bar; and a jury was sworn well and truly to try the several issues joined between our sovereign lord the king and John Harvey, and a true verdict to give according to the evidence. After divers of the facts had been proved, the under-sheriff of Suffolk proved the proclaiming of the order of council at

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Ipswich, a market town where the prisoner was accustomed to come frequently; but he said, that there were eight other market towns nearer to Benacre than Ipswich. It was likewise proved, that the order was proclaimed at Leostoff, a market town within five miles of Benacre, and at Hadley, another market town in which the prisoner lived. To this evidence Ford demurred; and for cause said, that this was not a proclamation within the meaning of the statute, which directs that the proclamation shall be made in two market towns near the place where the offence was committed, whereas Hadley is forty-two miles distant from thence, and Ipswich thirty-three: and it appears, from the evidence of the under-sheriff, that there are several market towns much nearer to Benacre. The counsel for the crown answered, that the word *near* is in this, as in many other acts of parliament, merely directory; that the intention of the statute is nothing more than that the proclamation should, at the discretion of the sheriff, be made where the party is most likely to hear of it; and that this intention has in the present case been fully answered. If the legislature had intended a place than which none is nearer, they would not have made use of the word *near*, but of the word *next*; which might for several reasons have been inconvenient, and seems to have been avoided with design. He insisted further, that this is a matter of fact, of which the jury are the proper judges. Ford in reply said, that although the word *near* was not intended to mean the same thing as the word *next*, it by no means follows, that market towns at the distance of forty miles can be said to be near; and especially, if as in this case there are eight market towns nearer; and that this is not a matter proper to be left to the jury. Lee, C. J.—If this man had been guilty of an offence against this statute, he was not under a necessity of surrendering himself upon these proclamations. Wright, J.—All the directions in this statute are very express, and nothing is left to discretion. It would be of very dangerous consequence to leave matters of this sort to the discretion of a sheriff, and then to inquire whether he has acted properly. Dennison, J.—No rule of law is more certain, than that in capital cases the words of an act of parliament must be strictly complied with. In the case of the *King v. Fletcher*, a smuggler, before smuggling was made a capital offence, it was holden, that a statute which creates a new felony must always be construed literally and strictly. I agree, that this statute does not intend to fix the making of the proclamations at the very next market towns; but it plainly intends, that they should be made near the place where the offence was committed, and not at the distance of thirty or forty miles. Foster, J.—The under-sheriff seems to have acted uprightly, and with a good intention; but the statute has not in fact been complied with; for, although the word *near* does not import the same rigid exactness as the word *next*, it certainly excludes the distance of thirty or forty miles, when there are so many market towns much nearer. The jury were directed by the court to find all the issues for the crown, except that in which it is averred, that the proclamations were made in two market towns near the place where the offence was committed, and to find that issue for the defendant.

MS. Rep. *Rex v. Harvey*, Easter 20 G. 2, in K. B.; [Fost. Cr. L. 51, S. C.; 1 Wils. 164, S. C.]

||As to rewards for detaining smugglers, and for seizures, see 6 G. 4, c. 108, § 63, 64, 66, 67, 68. Pope's Customs Guide, 450, (14th ed.)||

S O D O M Y.

SODOMY, so called from the prevalence of this crime in the city of Sodom, is an unnatural copulation between two human creatures, or between a human and a brute creature.

The word *buggery*, by which name this offence is likewise known, is derived from the Italian word *bugeraire*, which signifies *to pierce a hole through*.

If any crime deserve to be punished in a more exemplary manner, this does. Other crimes are prejudicial to society; but this strikes at the being thereof: it being seldom known that a person who has been guilty of abusing his generative faculty so unnaturally, has afterwards a proper regard for women.

From that indifference to women, so remarkable in men of this depraved appetite, it may fairly be concluded that they are cursed with insensibility to the most ecstatic pleasure which human nature is in the present state capable of enjoying.

It seems a very just punishment that such wretches should be deprived of all taste for an enjoyment upon which they did not set a proper value; and the continuation of an impious disposition, which might have been transmitted to their children, if they had any, may be thereby prevented.

By the Levitical law, not only the man or woman guilty of bestiality was to suffer death, but the beast was likewise to be put to death. This is said to have been ordained, not because the beast had offended, but for the following reasons:—That the like foul passion might not be excited in another person by the sight of the beast; that the beast might not, by remaining alive, keep up the remembrance of the wretch who had suffered; and, that the beast might not, as sometimes happens, bring forth a monster, the sight of which would be offensive and hateful to all good men. A fourth reason is added in a note upon the passage; namely, that the Divine Author of the Levitical law, to make mankind sensible how detestable this crime is in his eyes, would have every creature put to death which had contributed to the commission thereof.

Puff. Law of Nature and Nations, b. 2, c. 3, § 3.

It is laid down by Coke, C. J., that the least degree of penetration maketh a carnal knowledge.

3 Inst. 59.

It is said that, as every indictment for sodomy must contain the words, *rem veneream habuit et carnaliter cognovit*, some kind of penetration, and also of emission, must be proved; and that emission is *prima facie* evidence of penetration.

1 Hawk. Pl. C. 6.

It must be allowed that penetration may be without emission; and it is easy to conceive that it would in some cases be difficult to prove emission where it has in fact been. It seems then a little strange to make the proof of emission necessary to the proof of sodomy.

It is indeed said, in one of the books cited by Mr. Serjeant Hawkins,

Sodomy.

that emission is an evidence of buggery; but it is not said that the proof of emission is necessary upon an indictment for buggery.

3 Inst. 59.

Hale, C. J., goes further; his opinion being, that proof of emission is not necessary upon an indictment for buggery.

1 H. H. P. C. 628.

The patient in this offence, as well as the agent, is guilty of felony, unless he be under fourteen years of age.

3 Inst. 59; 1 H. H. P. C. 670.

Although this offence can be committed by only two persons, yet if any other person be present, abetting and aiding, he is a principal.

3 Inst. 59; 1 H. H. P. C. 670.

It appears from divers authors, that in ancient times the punishment of this offence was death; but they differ as to the mode of inflicting it.

According to Britton, a sodomite was to be burnt.

Britt. lib. 6, c. 9.

In Fleta it is said, *pecorantes et sodomitæ in terrâ vivi confodiantur*.

Flet. lib. 6, c. 35.

With the latter agrees the Mirror; and it is added, *issint que memoire seont restraine, pur le grand abomination del fait*.

Mirr. c. 4, § 14.

About the time of Richard the First, the practice was to hang a man, and drown a woman, guilty of this offence.

3 Inst. 58.

The practice of punishing this offence with death, had, for some time before the making of the statute of the 25 H. 8, c. 6, been discontinued.

By this statute, after reciting that there is not yet a sufficient punishment appointed for the detestable and abominable vice of buggery with mankind or beast, it is enacted, "That the same offence be from henceforth adjudged felony; and that the offender, being thereof convicted, shall suffer such pains of death as felons are accustomed to do according to the order of the common law of this realm; and that no person, offending in any such offence, shall be admitted to his clergy."

This statute was repealed by the 1 Mar. c. 1, but it was revived, and made perpetual, by the Eliz. c. 17.

A man was found guilty of having committed buggery upon a girl eleven years of age, and had received sentence of death; but the judge before whom he was tried, reprieved him, in order to obtain the opinion of the judges, whether this was a case within the statute. It was said, that no opinion was given; because the judges were not unanimous: but Fortescue Aland, J., who reports the case, affirms, that a great majority of them were of opinion that this is a buggery by the law of England. He adds, that the Earl of Macclesfield, then chancellor, to whom he wrote upon the occasion, was clearly of opinion, that this case is not only within the reason, but also within the words, of the statute; and that he was surprised there should have been any difference of opinion among the judges. The reporter moreover cites several authorities to show that, under the word "mankind," which is a word used in the statute, all females as well as males of the human species are comprehended.

Fortesc. 91, Rex v. Wiseman.

Soldiers.

||To constitute this offence, the act must be in that part where sodomy is usually committed.(a)

(a) Rex v. Jacob, Russ. & Ry. 331.

An unnatural connection with an animal of the fowl kind is not sodomy, a fowl not coming under the term "beast."(b)

(b) Rex v. Mulreaty, MS. Bayley, J., 1 Russ. on Cri. 568.]]

SOLDIERS.

A SOLDIER, so called from the German word *sold* or *sould*, which signifies a stipend, is a man hired for pay to serve in war.

The ancient method of raising soldiers was in this manner:—A knight or an esquire, who had revenues, farmers, and tenants, covenanted with the king, by indenture enrolled in the Exchequer, to serve him in war for a certain term, with a certain number of men, whose names were set down in a list.

1 Inst. 71.

||It was also usual in ancient times by the king's special warrant, sometimes by special commission, sometimes by immediate writ out of Chancery, in times of war to deliver persons in prison for felony upon mainprise, to go into foreign parts in the king's wars, as Gascoigne, and elsewhere, at the king's wages; *et stabunt recto in curiâ* at their return, *si quis versus eos loqui voluerit*, and upon return of such manucaptions into the Chancery to have charters of pardon.

Hales' Pl. Cr. v. 2, 143; Bac. on Gov. part ii. p. 11.]]

There are divers regulations concerning soldiers in some ancient statutes; but as these were adapted to the ancient method of raising soldiers, which has for many years been discontinued, it is not necessary to give an account of such regulations.

18 H. 6, c. 18, 19; 7 H. 7, c. 1; 3 H. 8, c. 5; 2 & 3 E. 6, c. 2; 4 & 5 P. & M. c. 3.

The regulations as to soldiers at this time observed, depend upon some modern acts of parliament, and principally upon one which is passed annually, intituled *An act for punishing mutiny and desertion, and for the better payment of the army, and their quarters*.

||Vide articles of war established by Hen. 5, in Petyt, Coll. vol. i. p. 509, *et seq.*]]

Such of these regulations as are of more general use to be known, shall be treated of in the following order:—

(A) Of enlisting Soldiers.

(B) In what Cases Soldiers are free from Arrest.

(C) Of quartering Soldiers.

(D) Of Carriages for the Use of His Majesty's Forces.

(E) Of the Penalties incurred by encouraging Desertion or harbouring a Deserter, and of the Reward for apprehending a Deserter.

(A) Of enlisting Soldiers.

(F) Of the Military Punishments to which Soldiers are liable.

(G) Of the Civil Punishments to which Soldiers are liable.

(H) Of the Liberty given to Soldiers of exercising Trades.

[(I) Of Officers' Liabilities and Authorities.]

(K) Of divers Things, which did not fall under any of the foregoing Heads.

(A) Of enlisting Soldiers.

By 10 G. 4, c. 6, § 32, (the Mutiny Act,) it is enacted, That every person who shall receive enlisting money from any person employed in the recruiting service, he being an officer, non-commissioned officer, or an attested soldier, shall be deemed to be enlisted as a soldier in his majesty's service. and while he shall remain with the recruiting party shall be entitled to be billeted; and every person who shall enlist any recruit shall first ask the person offering to enlist whether he does or does not belong to the militia, and shall cause to be taken down in writing the name and place of abode of such recruit; and when any person shall be enlisted as a soldier in his majesty's land service, he shall, within four days, but not sooner than twenty-four hours after such enlisting, appear, together with some person employed in the recruiting service of the party with which he shall have enlisted, before a justice residing in the vicinity of the place, and acting for the division or district where such recruit shall have been enlisted, and not being an officer in the army; and if such recruit shall declare his having voluntarily enlisted, the said justice shall cause to be read to him the notice contained in the schedule to this act annexed, and shall examine him whether he does or does not belong to the militia, and shall require the recruit to sign a declaration in the form in the said schedule, and he is hereby required forthwith to cause to be read over in his own presence to such recruit the first and second article of the second section (a) of the articles of war against mutiny and desertion, and to administer to such recruit the oath of allegiance and fidelity, and oath in the schedule to this act annexed, for limited and unlimited service, or for services in the forces of the East India Company, as may be applicable to the case of the recruit, and no other oaths, any thing in any act to the contrary notwithstanding; and the said justice is hereby required forthwith to certify, under his hand, the enlisting and swearing, in the form attached to such oaths respectively, together with the place of birth, age, and calling, if known, of such recruit; and if any such recruit so to be certified shall refuse to take the oath of allegiance and fidelity before the said justice, it shall be lawful for the officer or non-commissioned officer with whom he enlisted to detain and confine such person until he shall take the said oath of fidelity.

(a) See post, p. 164.

§ 33. And be it enacted, That any recruit appearing as aforesaid before such justice shall be at liberty to declare his dissent to such enlisting, and upon such declaration, and returning the enlisting money, and also pay the sum of 20s. for the charges expended upon him, together with the full amount of subsistence and beer-money which shall have been paid to such recruit subsequent to the period of his having been enlisted, shall be forthwith discharged and set at liberty, in the presence of such justice; but if such

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person shall refuse or neglect, within the space of twenty-four hours after so declaring his dissent, to return such money as aforesaid, he shall be deemed and taken to be enlisted as if he had given his assent thereto before the said justice: provided also, that it shall be lawful for any justice to discharge any person who shall have hastily enlisted, and who shall apply to him to declare his dissent within such four days as aforesaid, upon payment of the sum of money required to be paid by any recruit declaring his dissent under this act, notwithstanding no person belonging to the recruiting party shall be with the recruit, if it shall appear to such justice, upon proof to his satisfaction, that the recruiting party has left the place where such recruit was enlisted, or that the recruit could not procure any person belonging to such party to go with him before the justice; and the sum paid by such recruit upon his discharge shall be kept by the justice, and be paid to any person belonging to the recruiting party entitled thereto demanding the same: provided that no recruit who has been actually, though erroneously, discharged by the justice before the expiration of twenty-four hours after the time of his enlistment, shall be liable on that account to be proceeded against as having deserted from his majesty's service; and the justice who shall discharge any recruit shall in every case give a certificate thereof, signed with his hand, to the recruit, specifying the cause thereof.

§ 34. And be it enacted, That if any recruit shall receive the enlisting money from any person employed in the recruiting service, (knowing it to be such,) and shall abscond, or refuse to go before such justice, or shall thereafter absent himself from the recruiting party or person with whom he enlisted, and shall not voluntarily return to go before some justice within such period of four days aforesaid, such recruit shall be deemed to be enlisted and a soldier in his majesty's service, as fully to all intents and purposes as if he had been duly attested, and may be apprehended and punished as a deserter, or for being absent without leave, under any articles of war made for punishment of mutiny and desertion; and such recruit shall not be discharged by any justice of the peace after the expiration of such four days as aforesaid, unless it shall be proved to the satisfaction of such justice that the true name and residence of the recruit was disclosed and known to the recruiting party, and that no notice was given to the recruit, or left at his usual place of abode, of his having so enlisted: provided that in every case wherein any recruit shall have received enlisting money, and shall have absconded from the party, so that it shall not be possible immediately to apprehend and bring him before a justice, the officer or non-commissioned officer commanding the party shall produce to the justice before whom the recruit ought regularly to have been brought for attestation, a certificate of the name and place of residence of such recruit; and the justice to whom such certificate shall be produced, shall, after satisfying himself that the recruit who had absconded cannot be found and apprehended, transmit a duplicate thereof to his majesty's secretary at war, or if in Ireland to the chief secretary, in order that, in the event of such recruit being afterwards apprehended and reported as a deserter, the facts of his having received enlisting money, and having absconded after having been enlisted, may be ascertained before he be finally adjudged to be a deserter; and any recruit who shall enlist into his majesty's forces, and who shall be discovered to be incapable of active service by reason of any infirmity concealed or not declared by such recruit before the justice at the

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time of his attestation, and mentioned at the foot thereof, may be transferred into any garrison, or veteran or invalid battalion, or into his majesty's marine forces, notwithstanding he shall have enlisted for any particular regiment, and shall be entitled to receive such proportion or residue of bounty only as his majesty may allow in that behalf, instead of the bounty upon which such man shall have been enlisted, any thing in any act or acts, or any rules and regulations relating to soldiers to the contrary notwithstanding; and it shall be lawful for any two justices before whom such recruit shall be brought, and who shall be proved, upon oath before them, to have wilfully concealed any such infirmity upon being attested, or to have designedly made any false representation as aforesaid, to adjudge such person to be a rogue and vagabond, and to sentence him to such punishment as by any law now in force may be inflicted upon rogues and vagabonds, and vagrants, and incorrigible rogues; and any recruit who shall designedly make any false representation of any particular contained in the oaths and certificates in the schedule to this act annexed, before the justice at the time of his attestation, and shall obtain any enlisting money, or any bounty for entering into his majesty's service, or any other money, shall be deemed guilty of obtaining money under false pretences within the true intent and meaning, if in England, of an act, intituled *An act for consolidating and amending the laws in England relative to larceny and other offences connected therewith*; and if in Ireland, of an act passed in the ninth year of the reign of his present majesty, intituled *An act for consolidating and amending the laws in Ireland relative to larceny and other offences connected therewith*; and the production of such certificate, and proof of the handwriting of the justice giving such certificate, shall be sufficient evidence of such party having represented the several particulars contained in the oath sworn by him, and specified in the certificate of the justice at the time of his being attested; and that proof by the oath of one or more credible witnesses that the person so prosecuted hath voluntarily acknowledged that at the time of his enlistment he belonged to the militia, or to any regiment in his majesty's service, or to his majesty's navy or marines, shall be deemed and taken as evidence of the fact so by him acknowledged, without production of any roll or other document to prove the same; and any man who at the time of offering to enlist shall deny that he is a militiaman then actually enrolled and engaged to serve, or shall deny to the justice before whom he shall be attested that he belongs to the militia, shall, on conviction thereof before any one justice in the United Kingdom, either upon oath of one witness or upon his own confession, or upon the production of the attestation, and the before-mentioned declaration of such person, certified by the secretary at war, or deputy-secretary at war, be committed to the common jail or house of correction, there to remain without bail or mainprize for and during any time not exceeding six calendar months, over and above any penalty or punishment to which such person so offending may be otherwise liable; and shall, from the day on which his engagement to serve in the militia shall end, and not sooner, belong as a soldier to the corps of his majesty's regular forces, or of the East India Company's forces, into which he shall have so enlisted: provided that every such person shall be liable to serve within the United Kingdom of Great Britain and Ireland, in any regiment, battalion, or corps of his majesty's regular forces, or of the East India Company's forces in which he has so enlisted, during all the time the militia to which he shall belong

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shall remain disembodied, or shall not be called out for training or exercise, and shall during all such time be subject to all the provisions of this act, and liable to be apprehended and dealt with and punished as a deserter from the corps in which he shall have so enlisted, if he shall neglect or refuse to join and serve in such corps as aforesaid.

10 G. 4, c. 6, § 35. And be it enacted, That every military officer who shall act contrary to the provisions of this act in any respect regarding the enlisting and attesting of recruits for his majesty's service, shall, upon proof thereof, upon oath by two witnesses, before a general court-martial, which is hereby authorized to administer such oath, be cashiered and disabled to hold any civil or military office in his majesty's service.

§ 36. And whereas it is expedient that provisions should be made for enlisting and attesting of soldiers desirous of re-enlisting and others desirous of enlisting abroad, be it enacted, that it shall be lawful for any person duly appointed by his majesty by any warrant signed by the secretary at war in that behalf, and not being a general officer nor holding any regimental commission, to enlist and attest out of Great Britain or Ireland any soldiers or persons desirous of enlisting or re-enlisting into his majesty's service; and any person so appointed shall have the same powers in that behalf as are given to justices in the United Kingdom for all such purposes of enlistment and attestation, and any person so enlisted or re-enlisted shall be deemed to be an attested soldier; and as often as any corps shall be relieved or disbanded at any station beyond the seas, it shall be lawful for any officers, thereunto authorized by the officer commanding in chief at such station, to enlist as many of the soldiers belonging to the corps leaving the station as shall be willing and fit for service for any corps appointed to remain; and every soldier so enlisted is hereby deemed to be discharged from his former corps, and an attested certificate of transfer shall be delivered to the soldier.

§ 37. And be it enacted, That all negroes purchased by or on account of his majesty, his heirs, and successors, and serving in any of his majesty's forces, shall be deemed and taken to be free in every respect as if born free in any part of his majesty's dominions, and shall be considered as soldiers having voluntarily enlisted in his majesty's service: provided that nothing contained in this act as to enlisting for limited periods of service, or in any other act as to any rules or regulations for granting pensions or allowances to soldiers discharged after certain periods of service, shall extend to any negroes so purchased.||

The second section of the articles of war, which is to be read to an enlisted man, contains the following articles:—

Art. 1. “Whatsoever officer or soldier shall presume to use traitorous or disrespectful words against the sacred person of his majesty, his royal highness the Prince of Wales, or any of the royal family; if a commissioned officer, he shall be cashiered; if a non-commissioned officer or soldier, he shall suffer such punishment as shall be inflicted upon him by the sentence of a court-martial.”

Art. 2. “Any officer or soldier who shall behave himself with contempt or disrespect towards the general or other commander in chief of our forces, or shall speak words tending to his hurt or dishonour, shall be punished according to the nature of his offence by the judgment of a court-martial.”

Art. 3. “Any officer or soldier who shall begin, excite, cause, or join

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in any mutiny or desertion in the troop, company, or regiment to which he belongs, or in any other troop or company in our service, or on any party, post, detachment, or guard, on any pretence whatsoever, shall suffer death, or such other punishment as by a court-martial shall be inflicted."

Art. 4. "Any officer, non-commissioned officer, or soldier, who, being present at any mutiny or sedition, does not use his utmost endeavours to suppress the same, or, coming to the knowledge of any mutiny, or intended mutiny, does not without delay give information thereof to his commanding officer, shall be punished by a court-martial with death or otherwise, according to the nature of his offence."

Art. 5. "Any officer or soldier, who shall strike his superior officer, or offer to draw or shall lift up any weapon, or offer any violence against him being in the execution of his office, on any pretence whatsoever, or shall disobey any lawful command of his superior officer, shall suffer death, or such other punishment as shall, according to the nature of his offence, be inflicted upon him by the sentence of a court-martial."

The sixth section of the articles of war, which is likewise to be read to an enlisted man, contains the following articles:—

Art. 1. "All officers and soldiers who, having received pay, or having been duly enlisted in our service, shall be convicted of having deserted the same, shall suffer death, or such other punishment as by a court-martial shall be inflicted."

Art. 2. "Any non-commissioned officer or soldier, who shall, without leave of his commanding officer, absent himself from his troop or company, or from any detachment with which he shall be commanded, shall, upon being convicted thereof, be punished, according to the nature of his offence, at the discretion of a court-martial."

Art. 3. "No non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company in which he last served, on the penalty of being reputed a deserter, and suffering accordingly: and in case any officer shall knowingly receive and entertain such non-commissioned officer or soldier, or shall not, after his being discovered to be a deserter, immediately confine him, and give notice thereof to the corps in which he last served, he, the said officer so offending, shall by a court-martial, be cashiered."

Art. 4. "Whatsoever officer or soldier shall be convicted of having advised or persuaded any other officer or soldier to desert our service, shall suffer such punishment as shall be inflicted upon him by the sentence of a court-martial."

The oath which is to be administered to an enlisted man is in these words:—"I swear to be true to our sovereign King George, and to serve him honestly and faithfully, in defence of his person, crown, and dignity, against all his enemies and opposers whatsoever; and to observe and obey his majesty's orders, and the orders of the generals and officers set over me by his majesty."

Parker, an apprentice, who had enlisted without the consent of his master, being brought up by a *habeas corpus* to the Court of King's Bench, was discharged.

MS. Rep. Rex and Parker, Easter, 31 G. 2.

||By 10 G. 4, c. 6, § 38, any person bound as apprentice, who shall

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enlist as a soldier, and shall state to the magistrate before whom he shall be carried that he is not an apprentice, shall, *on conviction*, be liable to be *indicted* for obtaining money on false pretences; and after the expiration of his apprenticeship, shall be liable to serve as a soldier; and if, on the expiration of his apprenticeship, he shall not deliver himself up to some officer authorized to receive recruits, may be taken as a deserter from his majesty's forces. (And see further as to apprentices enlisting, § 39, 40.)||

By the ||10 G. 4, c. 5,|| intituled *An act for the regulation of his majesty's marine forces while on shore*, ||nearly|| the same provisions are made as to the enlisting of men to serve as marines, as in the clauses above cited are made for the enlisting of men to serve as soldiers; and it may, once for all, be observed, that the same regulations, as to their being free from arrests, their quarters, their being subject to military punishments, and many other things, are made by this statute for marines, as are made by the mutiny acts for soldiers.

26 G. 3, c. 107, § 95. [In all cases of actual invasion, or upon imminent danger, and in all cases of rebellion or insurrection, his majesty is empowered (the occasion being first communicated to parliament, if the parliament be then sitting, or declared in council, and notified by proclamation, if no parliament be then sitting or in being) to order the lieutenants, or, in case of the death or absence of any of them, any three or more of the deputy-lieutenants, with all convenient speed to draw out and embody the militia within their respective counties, or such part of them as his majesty may judge necessary, and in such manner as shall be best adapted to the circumstances of the danger, and to put such forces under the direction of such general officers as his majesty may be pleased to appoint, to be led by their respective officers into any parts of the kingdom, for the repelling of the invasion, or suppressing the rebellion; and during such time as the militia shall be so drawn out and embodied, they shall be subject to all the provisions contained in any act of parliament which shall be then in force for punishing mutiny and desertion, and for the better payment of the army, and their quarters.]

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||By 10 G. 4, c. 6, § 3, (the Mutiny Act,) no person whatever (except an apprentice) enlisted into his majesty's service as a soldier, shall be liable to be arrested, or taken therefrom by reason of the warrant of any justice, on account of any breach of contract or engagement to serve or work for any employer: and no person enlisted as a soldier shall be liable to be taken out of his majesty's service by any process or execution whatsoever, other than for some criminal matter, unless an affidavit shall be made by the plaintiff, or some one on his behalf, for which no fee shall be taken, before some judge of the court out of which such process or execution shall issue, or before some person authorized to take affidavits in such courts; of which affidavit a memorandum shall, without fee, be endorsed on the back of such process, that the original debt for which the action has been brought, or execution sued out, amounts to 20*l.* at least over and above all costs; and any judge of such court may examine into any complaints made by a soldier, or by his superior officer, and by warrant under his hand discharge such soldier without fee, he being shown to be duly enlisted, and to have been arrested contrary to the intent of this act, and

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shall award reasonable costs to such complainant, who shall have for the recovery thereof the like remedy as would have been applicable to the recovery of any cost which might have been awarded against the complaint in any judgment or execution as aforesaid; provided that any plaintiff, upon notice of the cause of action first given in writing to any soldier, or left at his last place of residence before such listing, may file a common appearance in any action to be brought for or upon account of any debt whatever, and proceed therein to judgment and outlawry, and have execution other than *and against the body.

This clause is inaccurately worded, and is not so clear or explicit as the clause in the older acts from which it is altered. *Sic in statute.||

The exemption from being arrested, except for a criminal matter or a debt of ten pounds, extended formerly only to volunteers. But by the 30 G. 2, c. 8, § 20, it is enacted, "That the commissioners, present at a meeting for listing soldiers as in this act is before directed, shall cause the second and sixth sections of the articles of war against mutiny and desertion to be read to the men impressed by virtue of this act, and from and after the reading the said articles of war, every man so impressed shall be deemed a listed soldier to all intents and purposes, and shall not be liable to be taken out of his majesty's service by any process, other than for some criminal matter."

[This act is now expired.]

To a *latitat* issue to arrest a man, the sheriff returned, that he was listed according to the act of the 4 and 5 Ann. c. 10, *et ea occasione capere non possum*. It was insisted, that the sheriff ought to have arrested the defendant, and that he might afterwards have been discharged by a judge on common bail, if he were regularly listed, but that the sheriff was not to take upon himself to determine as to the regularity of the enlisting. The court upon consideration held the return to be good, and that, as the statute operated as a *supersedeas* to any process to be issued against a person enlisted, the sheriff, if he should arrest such person, would be liable to an action of false imprisonment. It appears from the clause, by which the plaintiff is enabled to file common bail and to proceed to judgment against the defendant, that it is not the intention of the statute that a soldier should be liable to be arrested, and be afterwards discharged on common bail. If this man were not regularly listed, the plaintiff has his remedy by action against the sheriff for a false return.

Ld. Raym. 1246, Sheriff of Middlesex's case.

A soldier being in custody upon a writ *de excommunicato capiendo*, for non-payment of costs in a suit for tithes in a court Christian, he was ordered by the Court of King's Bench to be discharged, as being within the reason of the mutiny act.

11 Mod. 191, Anon.

As the words heretofore in the mutiny act were, *that any person who voluntarily lists himself shall not be taken out of his majesty's service by any process whatsoever*, it was holden by the Court of King's Bench that only mesne process was intended, and that a soldier might be taken in execution. It appears, however, from what fell from Holt, C. J., that the Court of Common Pleas had at that time been of a contrary opinion.

Mascall v. Davys, 11 Mod. 234; [Mason v. Vowson, Ibid. 252. In both these cases there was fraud; the defendants enlisted themselves for the mere purpose of protection; the one after judgment, the other after verdict.]

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To remove all doubt as to this, the words now constantly inserted in the mutiny act are, *that no person listed as a volunteer in his majesty's service as a soldier, shall be liable to be taken out of his majesty's service by any process or execution whatsoever, other than for some criminal matter, unless for a real debt, &c.*

The construction of a mutiny act has been, that if more than ten pounds had been recovered by a judgment for damages and costs, in an action for a debt under ten pounds, and a second action be brought upon the judgment, a soldier shall not be discharged upon common bail; the court being of opinion that, as the debt which they were to consider was the sum recovered by the judgment, the defendant ought to be holden to special bail.

Nichol v. Wilder, Barnes, 432.

But it is provided by the present mutiny act, and by all the mutiny acts for some years past it hath been provided, *that the original debt, for which execution may be issued, must amount to ten(a) pounds at least over and above all costs of suit in the same action, or in any other action on which the same shall be grounded.*

(a) [By the late acts increased to twenty pounds.] ||See 10 G. 4, c. 6, § 3.||

A trooper, who listed on the sixteenth day of May, was arrested upon the nineteenth. Upon a motion to discharge him upon filing common bail, it was said for the plaintiff, that, as the affidavit only went to his having been learning to ride, this was not doing duty as the act requires, but was only to qualify himself for the doing it; but by the court—It is doing duty, he receives his pay and must be discharged on common bail.

Bagley v. Jenners, 1 Str. 2.

Upon a motion to discharge a gunner in the train of artillery upon filing common bail, it was insisted for the plaintiff, that a gunner receives one shilling *per* day for his pay, that he is appointed by warrant, and that he is in the nature of a commissioned officer. It was answered, that a gunner is listed as a common soldier is, and that he is liable to all the penalties in the mutiny act to which a common soldier is liable. He was discharged upon common bail; and by the court—We are informed that a gunner is within the description of a common soldier,(b) the extraordinary pay being only in consideration of the skill requisite in his place.

Johnson v. Lowth, 1 Str. 7; 10 Mod. 346, S. C. (b) [So are serjeants and drummers: for by Denison, J., "A serjeant is a soldier with a halbert; and a drummer is a soldier with a drum." Goodall's case, 1 Wils. 216; S. C. 1 Bl. Rep. 29, under the name of Lloyd v. Woodall.]

Upon a rule to show cause why a sum of money paid by the defendant should not be repaid, it appeared that the defendant was a private man in one of the troops of life-guards; and that, being arrested for a debt under ten pounds, he paid the debt in order to obtain his liberty: one question was, Whether the defendant be such soldier as is by the 26 G. 2, c. 5, exempted from being liable to an arrest for a debt under ten pounds? Wright, J., Denison, J., Lee, C. J., being absent, were of opinion that he is. And by Wright, J.—It is declared by that statute, "That no person who shall be listed, or shall list himself as a volunteer in his majesty's service as a soldier, shall be liable to be taken out of his majesty's service by any process, other than for some criminal matter, unless for a real debt of ten pounds." Foster, J., inclined to be of opinion, that as a person, instead of receiving money, pays a considerable sum upon being admitted as a pri-

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vate man into a troop of life-guards, such person is not a soldier within the meaning of that statute. At another day, a certificate being produced from the commissary-general's office, that the defendant did list himself as a volunteer, and it appearing that the articles of war were read over to him, and that the oath directed to be administered to a listed soldier by a justice of the peace was taken by him; Foster, J., concurred in opinion with the other justices. Another question was, Whether, although the defendant would, whilst under the arrest, have been entitled to the discharge of his person, he be now entitled to have the money paid to obtain his liberty repaid? It was holden that he is; and by the court—It is equally reasonable, that the money paid by the defendant to obtain his liberty should be repaid, as that his person, in case the application had been on that account, should have been discharged.

Sayer, 107, Methuen v. Martin, Mich. 27 G. 2.

An out-pensioner of Chelsea College having been arrested, a question arose, Whether he were entitled to his discharge as being a soldier in his majesty's service? It was holden that he was not; because he is not under military discipline, and only subject to the control of the commissioners of the college.

Bower v. Owen, Barnes, 432.

[These acts are confined to proceedings in civil actions, and will not protect soldiers imprisoned for disobeying orders of justices, or on any other *criminal* account.

Rex v. Archer, 2 Term R. 270; Rex v. Bowen, 5 Term R. 156.]

||And volunteer drill-serjeants, &c., though subject to the mutiny act so far as relates to trial and punishment by volunteer courts-martial, according to the statute 44 Geo. 3, c. 54, § 21, are not privileged from arrest for debt under these acts as regular soldiers. The privilege is that of the public, and not of the soldier; and where a soldier had given bail, and was at large, the Court of Common Pleas, after judgment recovered on the bail-bond, refused, on application of the bail, to set aside the proceedings and cancel the bail-bond.

Rickman v. Studwick, 8 East, 105; Bryan v. Woodward, 4 Taunt. 557.||

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§THE Constitution of the United States, Amendm. art. 3, directs that no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

||By the 10 Geo. 4, c. 6, § 49, (the Mutiny Act,) after reciting, that whereas by the Petition of Right, in the third year of King Charles the First, it is enacted and declared, that the people of the land are not by the laws to be burdened with the sojourning of soldiers, against their wills; and by a clause in an act of parliament, made in the one-and-thirtieth year of the reign of King Charles the Second, it is declared and enacted, that no officer, civil or military, or other person whatsoever, should from thenceforth presume to place, quarter, or billet any soldier upon any subject or inhabitant of this realm, of any degree, quality, or profession whatsoever, without his consent; and that it shall be lawful for any subject, sojourner, or inhabitant to refuse to quarter any soldier, notwithstanding any warrant or billeting whatsoever; it is enacted, "That it shall and may be lawful for

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the constables of parishes and places, and other persons specified in this act, in England and Ireland, and they are hereby required to billet the officers and soldiers in his majesty's service, and every person receiving pay in his majesty's army, and the officers belonging to his majesty's cavalry, and also all staff and field officers' horses, and all bāt and baggage horses belonging to any of his majesty's other forces, when on actual service, not exceeding for each officer the number for which forage is or shall be allowed by his majesty's regulations in victualling-houses and other houses specified in this act, (taking care in Ireland not to billet less than two men in any one house, except only in case of billeting cavalry, as specially provided,) and they shall be received by the occupiers of such houses in which they are so allowed to be billeted, and furnished with stables, hay, and straw, for such horses as aforesaid; and in England with diet and small beer, paying and allowing for the same the several rates that are or shall be established by any act in force in that respect, and for forage in Ireland, the rates established by the lord-lieutenant, or other sufficient authority, from time to time; the same to be regulated by the average rate of contracts for forage in Ireland, and for the use of stables in Ireland, fourpence per week for each horse, to be paid only during the time when such horses shall be provided with hay and straw by contract, and not by the occupiers of such houses as aforesaid; and at no time when troops are on a march shall any of them, whether infantry or cavalry, be billeted above one mile from the place mentioned in the route; and in all cases where cavalry shall be billeted in pursuance of this act, the men and their horses shall be billeted in one and the same house, except in case of necessity, and in no other case whatsoever shall there be less than one man billeted where there shall be one or two horses, nor less than two men where there shall be four horses, and so in proportion for a greater number; and in such case, each man shall be billeted as near his horse as possible; and the constables are hereby required to billet all soldiers and their horses on their march in a just and equal proportion upon the keepers of all houses within one mile of the place mentioned in the route, although some of such houses may be in the adjoining county, in like manner in every respect as if such houses were locally situate within such place; provided that nothing herein contained shall be construed to extend to authorize any constable to billet soldiers out of the county to which such constable belongs, when the constable of the adjoining county shall be present, and undertake to billet the due proportion of men in such adjoining county: and no more billets shall at any time be ordered than there are effective soldiers and horses present to be billeted; all which billets, when made out by such constables, shall be delivered into the hands of the commanding officer then present; and if any person shall find himself aggrieved by having an undue proportion of soldiers billeted in his house, and shall prefer his complaint, if against a constable or other person not being a justice, to one or more justices, and if against a justice, then to two or more justices, within whose jurisdiction such soldiers are billeted, such justices respectively shall have power to order such of the soldiers to be removed and to be billeted upon other persons, as they shall see cause; and when any of his majesty's cavalry, or any horses as aforesaid, shall be billeted upon the occupiers of houses in which officers or soldiers may be quartered, by virtue of this act, who shall have no stables, then and in such case, and upon complaint made by the person having no stables to two or more justices within whose juris-

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diction such horses shall be so billeted, it shall be lawful for such justices to order the men and their horses, or horses only, to be billeted upon some other person or persons who have stables by this act liable to have officers and soldiers billeted upon them, and to order a proper allowance to be paid by the person relieved to the persons receiving such men and horses, or to be applied in the furnishing the requisite accommodation; and commanding officers may exchange any man or horse billeted in any place with another man or horse billeted in the same place, for the benefit of the service, provided the number of men and horses do not exceed the number at that time billeted on such houses; and the constables are hereby required to billet such men and horses so exchanged accordingly; and it shall be lawful for any justice, at the request of any officer or non-commissioned officer commanding any soldiers requiring billets, to extend any routes, or enlarge the district within which billets shall be required, in such manner as shall appear to be most convenient to the troops; provided that, to prevent or punish all abuses in billeting soldiers, it shall be lawful for any justice, within his jurisdiction, by warrant or order under his hand, to require any constable to give him an account in writing of the number of officers and soldiers who shall be quartered by such constable, together with the names of the persons upon whom such officers and soldiers are billeted, stating the street or place where such persons dwell, and the signs, if any, belonging to those houses; and it shall be lawful to billet officers and soldiers in Scotland according to the provisions of the laws in force in Scotland at the time of its union with England; and no officer shall be obliged to pay for his lodging where he shall be regularly billeted, except in the suburbs of Edinburgh."

§ 50. And be it enacted, "That the officers and soldiers of his majesty's foot-guards shall be billeted within the city and liberties of Westminster, and places adjacent, lying in the county of Middlesex, (except the city of London,) and in the county of Surrey, and in the borough of Southwark, in the same manner, and under the same regulations, as in other parts of England, and in all cases for which particular provision is not made by this act; and the high constable shall, upon the receipt of the order for billeting soldiers, deliver precepts to the several constables within their respective divisions, in pursuance of which the said constables shall billet such officers and soldiers equally and proportionally on the houses, subjected thereto by this act; and the said constable shall, at every general quarter-sessions of the peace to be holden for the said city and liberties, counties and borough respectively, make and deliver to the justices then in open session assembled, upon oath, which oath the said justices are hereby required to administer, lists, signed by them respectively, of the houses subject by this act to receive officers and soldiers, together with the names and rank of all officers and soldiers billeted on each respectively; which lists shall remain with the respective clerks of the peace, for the inspection of all persons, without fee or reward; and such clerk shall forthwith, from time to time, deliver to any person who shall require the same, true copies of any such list, upon being paid two pence a sheet for the same; each sheet to contain at least one hundred and fifty words."

§ 51. And be it enacted, "That no justice having or executing any military office or commission in any part of the United Kingdom, shall, directly or indirectly, be concerned in billeting or appointing quarters for any soldier in the regiment, troop, or company, under the immediate com-

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mand of such justice, but that all warrants, acts, or things, so appointed by such justice for or concerning the same, shall be void."

§ 52. And be it enacted, "That in case any victualler, or other person on whom soldiers may be billeted, (except on the march,) shall be desirous to furnish such soldiers with candles, vinegar, and salt, gratis, and to allow such soldiers the use of fire, and the necessary utensils for dressing and eating their meat, and shall give notice of such his desire to the commanding officer, and shall actually furnish the same, then the soldiers so billeted shall find their own victuals and small-beer; and every officer to whom it belongs to receive, or who does actually receive the pay for any officers or soldiers, shall every four days, or before they quit their quarters, if they shall not remain so long as four days, settle the just demands of all victuallers, or other person upon whom such officers and soldiers are billeted, out of their pay and subsistence, before any part of the said pay or subsistence be distributed to them respectively; and if any officer aforesaid shall not pay the same, upon complaint and oath made thereof by any two witnesses at the next quarter-sessions for the county or city where such quarters were situated, the secretary at war is hereby required (upon certificate of the justices before whom such oath was made of the sum due upon such accounts, and the persons to whom the same is owing) to give orders to the regimental agent to pay the said sums, and to charge the same against such officers; and in case of any soldier being ordered suddenly to march, and that the respective commanding officers are not enabled to make payment of the sums due for the lodging of the men, and stabling for the horses, every such officer shall, before his departure, make up the account with every person upon whom such soldier shall have been billeted, and sign a certificate thereof; which account and certificate shall be transmitted to the agent of the regiment, who is hereby required to make immediate payment thereof, and to charge the same to the account of such officer."

§ 53. And be it enacted, "That all clauses and provisions in this act contained relating to England, shall be construed to extend to Wales, and to the town of Berwick-upon-Tweed; and all clauses and provisions relating to the British isles shall be construed to extend to Guernsey, Jersey, Alderney, Sark, and Man, and all isles thereto and to England and Ireland belonging; and all clauses and provisions relating to soldiers shall be construed to extend to non-commissioned officers, unless when otherwise provided; and all clauses and provisions relating to justices shall be construed to extend to all magistrates authorized to act as such in their respective jurisdictions, and to chief magistrates of exclusive local jurisdictions; and all the powers given to and regulations made for the conduct of constables in relation to the billeting of officers and soldiers, and all penalties and forfeitures for any neglect thereof, shall extend to all tithingmen, headboroughs, and such like officers, and high constables and other chief officers and magistrates of cities, towns, villages, hamlets, parishes, and places in England and Ireland; and on their default or absence, to any justice of the peace inhabiting in or near any city, town, village, or place, who shall act in the execution of this act in relation to billeting; and all provisions for billeting officers and soldiers in victualling-houses, shall extend and apply to all inns, livery-stables, alehouses, and to the houses of sellers of wine by retail, whether British or foreign, to be drank in their own houses, or places thereunto belonging, and to all houses of persons selling brandy, strong waters, cider, or metheglin, by retail, in England and Ireland; and in Ire-

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land, when there shall not be found sufficient room in such houses, then to billeting soldiers in such manner as has been heretofore customary; provided that no officer or soldier shall be billeted in England in any private houses, or in any canteen held or occupied under the authority of the ordnance department, or upon persons who keep taverns only, being vintners of the city of London, admitted to their freedom of such company in right of patrimony or apprenticeship, notwithstanding such persons who keep such taverns only have taken out victualling licenses; nor in the house of any distiller kept for distilling brandy and strong waters, nor in the house of any shopkeeper whose principal dealings shall be more in other goods and merchandise than in brandy and strong waters, so as such distillers and shopkeepers do not permit tippling in such houses; nor in the house of residence in any part of the United Kingdom of any foreign consul duly accredited as such.”||

In an action of trespass against a constable for quartering a dragoon upon the plaintiff, it was found by a special verdict, that the plaintiff kept a house at Epsom, and let lodgings to such as came there for the benefit of the air and waters, that he dressed meat for his lodgers at four pence per joint, and sold them small beer at two pence per mug, and that he likewise found them stable-room, hay, and other things for horses, at certain rates; and the question was, Whether he were liable to have a soldier quartered upon him? It was holden that he was not; and by Holt, C. J.—This case is so plain, that there is no occasion for giving reasons.

In an action of trespass against two justices of the peace, who had issued a warrant for levying the penalty upon the plaintiff for not receiving a soldier billeted upon him, the case appeared upon the evidence to be thus:—A shopkeeper, who likewise dealt in spirituous liquors, in order to entitle himself to a license for selling spirituous liquors by retail, had a license as a victualler. For the sake of obtaining this last license, some beer was laid in by him, of which an account was taken by the excise officer, as is done of the stock of a victualler; but he never sold any of this, nor acted in any manner as a victualler, nor suffered spirituous liquors to be drank in his house. The plaintiff was nonsuited, for want of producing the warrant of the two justices; but Foster, J., before whom the cause was tried, said, he should upon the merits have been of opinion, that the plaintiff was not liable to have soldiers quartered upon him.

MS. Rep. *Morton v. Cloebury and another*, Bucks, Lent Assizes, 1757.

||SOLDIERS TO REMOVE DURING ELECTIONS.||—By the 8 G. 2, c. 30, § 1, after reciting, that by the ancient common law of this land all elections ought to be free; and that by an act passed in the third year of the reign of King Edward the First, of famous memory, it is commanded, upon great forfeiture, that no man by force of arms, nor by malice or menacing, shall disturb any to make free election; and that the freedom of elections of members to serve in parliament is of the utmost consequence to the preservation of the rights and liberties of this kingdom; and that it hath been the usage and practice, to cause any regiment, troop, or company, or any number of soldiers, which hath been quartered in any city, borough, town, or place where any election of members to serve in parliament hath been appointed to be made, to remove and continue out of the same during the time of such election, except in such particular cases as are hereinafter specified; to the end that the said usage and practice may be settled and

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established for the future, it is enacted, "That when and as often as any election of any peer or peers to represent the peers of Scotland in parliament, or of any member or members to serve in parliament, shall be appointed to be made, the secretary at war for the time being, or in case there shall be no secretary at war, then such person who shall officiate in the place of the secretary at war, shall and is hereby required, at some convenient time before the day appointed for such election, to issue and send forth proper orders in writing, for the removal of every such regiment, troop, or company, or other number of soldiers, as shall be quartered or billeted in any such city, borough, town, or place, where such election shall be appointed to be made, out of every such city, borough, town, or place, one day at least before the day appointed for such election, to the distance of two or more miles from such city, borough, town, or place, and not to make any nearer approach to such city, borough, town, or place as aforesaid, until one day at the least after the poll to be taken at such election shall be ended, and the poll-books closed."

By § 2, it is enacted, "That in case the secretary at war for the time being, or such person who shall officiate in the place of the secretary at war, shall neglect or omit to issue or send forth such orders as aforesaid, according to the true intent and meaning of this act, and shall be thereof lawfully convicted, upon any indictment to be presented at the next assizes or sessions of oyer and terminer to be held for the county where such offence shall be committed, or on an information to be exhibited in the Court of King's Bench within six months after such offence committed, such secretary at war, or person who shall officiate in the place of the secretary at war, shall for such offence be discharged from their said respective offices, and shall from thenceforth be utterly disabled and made incapable to hold any office or employment, civil or military, in his majesty's service."

But by § 5, it is provided, "That the secretary at war, or such person who shall officiate in the place of the secretary at war, shall not be liable to any forfeiture or incapacity, for not sending such order as aforesaid, upon any election to be made of a member to serve in parliament on a vacancy of any seat there, unless notice of the making out any new writ for such election shall be given to him by the clerk of the crown in Chancery, or other officer making out any new writ for such election, which notice he is hereby directed and required to give with all convenient speed after the making out the said writ."

By § 3, it is provided, "That nothing in this act contained shall extend, or be construed to extend, to the city and liberty of Westminster, or the borough of Southwark, for or in respect of the guards of his majesty, his heirs or successors, nor to any city, borough, town, or place, where his majesty, his heirs or successors, or any of his royal family, shall happen to be or reside at the time of any such election as aforesaid, for or in respect of such number of troops or soldiers only as shall be attendant as guards to his majesty, his heirs or successors, or to such other person of the royal family as is aforesaid; nor to any castle, fort, or fortified place, where any garrison is usually kept, for or in respect of such number of troops or soldiers only, whereof such garrison is composed."

By § 4, it is provided, "That nothing in this act shall extend, or be construed to extend, to any officer or soldier, who shall have a right to vote at any such election as aforesaid, but that every such officer and soldier may freely, and without interruption, attend and give his vote at such

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election; any thing hereinbefore contained to the contrary notwithstanding."

||10 G. 4, c. 6, § 63. And be it enacted, "That if any person shall knowingly detain, buy, exchange, or receive from any soldier or deserter, or any other person, on any pretence whatsoever, or shall solicit or entice any soldier, knowing him to be such, to sell any arms, ammunition, clothes, or military furniture, or any provisions, or any sheets or other articles used in barracks, provided under barrack regulations, or any regimental necessities, or any article of forage provided for any horses belonging to his majesty's service, or change the colour of any clothes as aforesaid, shall forfeit for every offence the sum of ten pounds, together with treble the value of all or any of the several articles of which such offender shall become so possessed."||

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By the 10 G. 4, c. 6, § 54, it is enacted, "That for the regular provision of carriages for his majesty's forces, in their marches in England and Ireland, all justices of the peace, within their several jurisdictions, being duly required thereunto by an order from his majesty, or the general of his forces, or the master-general or lieutenant-general of his majesty's ordnance, if in England, or by an order from the lord-lieutenant or other chief governor or governors of Ireland, or from the officer commanding the forces there, shall, on production of such order, issue a warrant, to any constable having authority to act in any place from, through, near, or to which the troops shall be ordered to march, (for each of which warrants the fee of one shilling only shall be paid,) requiring him to provide the carriages, horses, oxen, and drivers therein mentioned, and allowing sufficient time to do the same, specifying the places from and to which the said carriages shall travel, and the number of miles between the places, for which number only so specified payment shall be demanded, and which number of miles shall not, except in cases of pressing emergency, exceed the day's march prescribed in the order of route, and shall in no case exceed twenty-five miles; and the constables receiving such warrants shall order such persons as they think proper, having carriages, to furnish the requisite supply, who are hereby required to furnish the same accordingly; and when sufficient carriages cannot be procured within the proper jurisdiction, any justice of the next jurisdiction shall, by a like course of proceedings, supply the deficiency; and in order that the burden of providing carriages may fall equally, and to prevent inconvenience arising from there being no justice residing near the place where troops may be quartered on the march, any justice residing nearest to such place may cause a list to be made out, at least once in every year, of all persons liable to furnish such carriages, and the number and description of their said carriages, (which lists shall at all seasonable hours be open to the inspection of the said persons,) and may by warrant under his hand authorize the constables within his jurisdiction to give orders to provide carriages, without any special warrant for that purpose, which order shall be valid in all respects; and all orders for such carriages shall be made from such lists in regular rotation, as far as the same can be done."

10 G. 4, c. 6, § 55. And be it enacted, "That the rates to be paid for carriages impressed shall be, in England, for every mile with a wagon with four or more horses, or a wain with six oxen, or four oxen and two

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horses, shall travel, one shilling; and for every mile any wagon with narrow wheels, or any cart with four horses, carrying not less than fifteen hundred weight, shall travel, ninepence; and for every mile every other cart or carriage with less than four horses, and not carrying fifteen hundred weight, shall travel, sixpence; and in Ireland for every hundred weight loaded on any wheel carriage, one halfpenny per mile; and such further rates may be added, not exceeding, in England, a total addition per mile of fourpence, threepence, or twopence, to the respective rates of one shilling, ninepence, or sixpence, and not exceeding, in Ireland, an additional halfpenny per mile for every three hundred weight, as may seem reasonable to the justices assembled at general sessions in England and Ireland, for their respective districts; and the order of such justices at sessions shall specify the average price of hay and oats at the nearest market town at the time of fixing such additional rates, the period for which the order shall be enforced not exceeding ten days beyond the next general sessions, (and no such order shall be valid unless a copy thereof, signed by the presiding magistrate and one other justice, shall be transmitted to the secretary at war within three days after the making thereof;) and in England, when the day's march shall exceed fifteen miles, the justice granting his warrant may fix a further reasonable compensation, not exceeding the usual rate of hire fixed by this act; and when any additional rates or compensation shall be granted, the justice shall insert in his own hand, in the warrant, the amount thereof, and the date of the order of sessions, if fixed by sessions, and the warrant shall be given to the officer commanding, as his voucher; provided that the officer or non-commissioned officer demanding carriages by virtue of the warrant of a justice shall, in England, pay down in hand the proper sums into the hands of the constables providing carriages, who shall give receipts for the same on unstamped paper; and, in Ireland, the officers or non-commissioned officers as aforesaid shall pay the owners or drivers of the carriages; and one third part of such payment shall be made before the carriage be loaded; and all the said payments in Ireland shall be made, if required, in the presence of a justice or constable; provided that no carriage shall be liable to carry more than thirty hundred weight in England, and in Ireland no car shall be liable to carry more than six hundred weight, and no dray more than twelve hundred weight; but the owners of such carriages in Ireland, consenting to carry a greater weight, shall be paid at the same rate for every hundred weight of the said excess; and the owners of such carriages in Ireland shall not be compelled to proceed, though with any less weight, under the sum of threepence a mile for each car, and sixpence a mile for each dray; and the loading of such carriages in Ireland shall be first weighed, if required, at the expense of the owner of the carriage, if the same can be done in a reasonable time, without hinderance of his majesty's service; and the providing and paying for carriages in Scotland shall be regulated by the law in force at the time of the union with England; provided that a cart with one or more horses, for which the furnisher shall receive ninepence a mile, shall be required to carry fifteen hundred weight at least; provided that no penalties or forfeitures in any act relating to highways or turnpike roads in the United Kingdom shall apply to the number of horses or oxen, or weight of loading the aforesaid carriage, which shall not on that account be stopped or detained."

§ 56. And be it enacted, "That it shall be lawful for his majesty, or the lord-lieutenant or chief governors of Ireland, by his or their order, dis-

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tinctly stating that a case of emergency doth exist, signified by the secretary at war, or, if in Ireland, by the chief secretary or under secretary, or the first clerk in the military department, to authorize any general or field officer, commanding his majesty's forces in any district or place, or to the chief acting agent for the supply of stores and provisions, by writing under his hand, reciting such order of his majesty, or lord-lieutenant or chief governor aforesaid, to require all justices within their several jurisdictions in England and Ireland to issue their warrants for the provision, not only of wagons, wains, carts, and cars kept by or belonging to any person, and for any use whatsoever, but also of saddle-horses, coaches, post-chaises, chaises, and other four-wheeled carriages kept for hire, and also of other boats, barges, and other vessels used for the transport of any commodities whatsoever upon any canal or navigable river, as shall be mentioned in the said warrants, therein specifying the place and distance to which such carriages or vessels shall go; and on the production of such requisition to such justice by any officer of the corps ordered to be conveyed, or by any officer of the commissariat or ordnance department, such justice shall take all the same proceedings in regard to such additional supply so required on the said emergency as he is by this act required to take for the ordinary provision of carriages; and all provisions whatsoever of this act as regard the procuring the ordinary supply of carriages, and the duties of officers and non-commissioned officers, justices, constables, and owners of carriages in that behalf, shall be, to all intents and purposes, applicable for the providing and payment, according to the rate of posting or of hire usually paid for such other description of carriages or vessels so required on emergency, according to the length of the journey or voyage in each case, but making no allowance for post-horse duty, or turnpike, canal, river, or lock-tolls, which duty or tolls are hereby declared not to be demandable for such carriages and vessels while employed in such service or returning therefrom; and it shall be lawful to convey thereon, not only the baggage, provisions, and military stores of such regiment or detachment, but also the officers, soldiers, servants, women, children, and other persons of and belonging to the same; and it shall be lawful for the justices of the peace assembled at their quarter sessions to direct the treasurer to pay, without fee, out of the public stock of the county or riding, or if such public stock be insufficient, then out of moneys which the said justices shall have power to raise for that purpose, in like manner as for county jails and bridges, such reasonable sums as shall have been expended by the constables within their respective jurisdictions for the carriages and vessels aforesaid, over and above what was or ought to be paid by the officer requiring the same, regard being had to the season of the year and condition of the ways by which such carriages and vessels are to pass."

10 G. 4, c. 6, § 61. And be it enacted, "That if any constable or other person, who by virtue of this act shall be employed in billeting any officers or soldiers in any part of the United Kingdom, shall presume to billet any such officer or soldier in any house not within the meaning of this act, without the consent of the owner or occupier thereof; or shall neglect or refuse to billet any officer or soldier on duty, when thereunto required, in such manner as is by this act directed, provided sufficient notice be given before the arrival of such troops; or shall receive, demand, or agree for any money or reward whatever, in order to excuse any person from receiving such officer or soldier, or shall quarter any of the wives, children, men

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or maid-servants of any officer or soldier in any such houses, against the consent of the occupiers; or shall neglect or refuse to execute such warrants of the justices as shall be directed to him for providing carriages, horses, or vessels, or shall demand more than the legal rates for the same; or if any person appointed by such constable to provide carriages, horses, or vessels, shall do any act or thing by which the execution of such warrants shall be hindered; or if any constable shall neglect to deliver unto the justices at quarter sessions lists of officers and soldiers of the foot-guards quartered according to the provision of this act, or shall cause to be delivered defective lists of the same; or if any person, liable by this act to have any officer or soldier quartered on him, shall refuse to receive or to afford proper accommodation or diet, or to furnish the several things directed to be furnished to officers and soldiers, or shall neglect or refuse to furnish good and sufficient stables, together with good and sufficient hay and straw for each horse, at the rate established by an act in force in that respect; such constables, victuallers, and other persons respectively, shall forfeit for every offence any sum not exceeding five pounds, nor less than forty shillings."

§ 62. And be it enacted, "That if any military officer shall take upon him to quarter soldiers otherwise than is limited and allowed by this act, or shall use or offer any menace or compulsion to or upon any mayors, constables, or other civil officers tending to deter and discourage any of them from performing any part of their duty under this act, or tending to induce any of them to do any thing contrary to their said duty, such officer shall for every such offence (being thereof convicted before any two or more justices of the county by the oath of two credible witnesses) be deemed and taken *ipso facto* cashiered, and shall be utterly disabled to hold any military employment in his majesty's service; provided that a certificate thereof shall be transmitted by the said justice to the judge advocate in London, who is hereby required to certify the same to the commander in chief and secretary at war, and that the said conviction be affirmed at some quarter sessions of the peace of the said county held next after the expiration of three months after such certificate of the justice shall have been transmitted as aforesaid; and if any military officer shall take, or knowingly suffer to be taken, any money or reward of any person for excusing the quartering of officers or soldiers, or shall billet any of the wives, children, men, or maid-servants of any officer or soldier in any house, against the consent of the occupier, he shall, upon being convicted thereof before a general court-martial, be cashiered; and if any officer shall constrain any carriage to travel beyond the distance specified in the justice's warrant, or shall not discharge the same in due time for their return home on the same day, if it be practicable, except in the case of emergency, for which the justice shall have given license, or shall compel the driver of any carriage to take up any soldier or servant, (except such as are sick,) or any woman to ride therein, except in case of emergency as aforesaid, or shall force any constable, by threatening words, to provide saddle-horses for himself and servants, or shall force horses from their owners, or in Ireland shall force the owner to take any loading until the same shall be first duly weighed, if the same can be done within a reasonable time, or shall, contrary to the will of the owner or his servant, permit any person whatsoever to put any greater load upon any carriage than is directed by this act, shall forfeit for every offence any sum not exceeding five pounds nor less than forty shillings."

(E) Of Desertion.

The court granted a *mandamus* upon the 1 G. 1, c. 34, directed to the justices of the peace, to allow the defendants, being constables, their extraordinary charges in providing carriages on the late expedition into Scotland.

Stra. 42, Rex v. Hunt and another, Hil. 3 G. 1.

It seems, as if the treasurer of the county had refused to pay this money to the constables ; for more than a year after, another *mandamus*, upon the same statute, was granted by the court, directed to the justices of the peace, for them to compel the treasurer of the county to reimburse a constable, of the name of Hunt, the extraordinary charges he had been at in providing carriages on the late expedition into Scotland.

Stra. 93, Hunt's case, East. 4 G. 1.

(E) Of Desertion.

§ THE Act of Congress, March 16, 1802, s. 19, enacts, that if any non-commissioned officer, musician, or private, shall desert the service of the United States, he shall, in addition to the penalties mentioned in the rules and articles of war, be liable to serve for and during such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment ; and such soldier shall and may be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended or tried. By the articles of war it is enacted that "any non-commissioned officer or soldier who shall, without leave from his commanding officer, absent himself from his troop, company, or detachment, shall, on being convicted thereof, be punished according to the nature of his offence, at the discretion of a court-martial." Art. 21. By the articles for the government of the navy, art. 16, it is enacted that "if any person in the navy shall desert to an enemy or rebel, he shall suffer death ;" and by art. 17, "if any person in the navy shall desert or entice others to desert, he shall suffer death, or such other punishment as a court-martial shall adjudge." §

|| By 10 G. 4, c. 6, § 10, it shall be lawful for any court-martial empowered to try the crime of desertion, in addition to any other punishment, to direct that the offender shall be marked on the left side, two inches below the armpit, with the letter (D), such letter not to be less than half-an-inch long, and to be marked upon the skin with some ink or gunpowder, or other preparation, so as to be visible and conspicuous, and not liable to be obliterated.

And by § 20, it is enacted, "That every soldier who shall desert from his majesty's service, shall be liable to all the pains and penalties imposed by this act, for any such offence, notwithstanding his having again enlisted into his majesty's service ; and every soldier, of right belonging to any corps from which he may have originally deserted, may be tried for deserting from any other corps in which he may afterwards have enlisted, or from his majesty's service, if he shall not, after such subsequent enlisting, have been placed in any corps ; or may be tried for any crime committed by him while serving therein, notwithstanding it shall be known that he had previously belonged to some other corps or party, and had not been discharged therefrom ; and, if such person shall be claimed by such other corps or party, and be proceeded against as a deserter therefrom, his subsequent desertion from any one or more corps, in which he may have un-

(E) Of Desertion.

warrantably enlisted, may be given in evidence, as an aggravation of his crime, previous notice being always given to such deserter of the intention to produce such evidence upon his trial."

By § 21 it is enacted, "That it shall be lawful for the constable of any place, where any person reasonably suspected to be a deserter shall be found, or of any adjoining place, and, if no such constable can be immediately met with, then for any officer or soldier in his majesty's service, to apprehend, or cause such suspected person to be apprehended, and to cause him to be brought before any justice living in or near such place, and acting for the same or any adjoining county, who hath hereby power to examine such suspected person; and if, by his confession or the testimony of one or more witnesses, upon oath, or by the knowledge of such justice, it shall appear that such suspected person is a soldier, and ought to be with the corps to which he belongs, such justice shall forthwith cause him to be conveyed to some public prison in such place, or, if there be no public prison in such place, then, at the discretion of such justice of the peace, to the nearest or most convenient public prison in the same or any next adjoining county, or to the provost-martial, in case such deserter shall be apprehended within the city or liberties of Dublin or places adjacent, and such justice shall transmit an account thereof in the form prescribed in the schedule annexed to this act, to the secretary at war, or, if the deserter be apprehended in Ireland, to the chief secretary, to the end that such person may be proceeded against according to law; and such justice shall also send to the secretary at war a report stating the names of the persons by whom the deserter was apprehended and secured; and the secretary at war shall transmit to such justice an order for the payment to such persons of such sum not exceeding 40s., as the secretary at war shall be satisfied they are entitled to, according to the true intent and meaning of this act; provided also, that no fee or reward shall be taken by any justice or his clerk in respect of any information, commitment, or report, as aforesaid."

And by § 22, "Any person who shall voluntarily deliver himself up as a deserter, or who, on being apprehended for any offence, shall, in the presence of the justices, confess himself to be a deserter as aforesaid, shall be deemed to have been duly enlisted, and to be a soldier, and shall be liable to serve in any of his majesty's forces as his majesty shall think fit to appoint, whether such person shall have been ever actually enlisted as a soldier or not; and, if the person so confessing himself to be a deserter shall be serving at the time in any of his majesty's forces, he shall be deemed to be and shall be dealt with as a deserter."

And by § 23 it is enacted, "That every person who shall, in any part of his majesty's dominions, directly or indirectly persuade any soldier to desert his majesty's service, (a) shall suffer such punishment, by fine or imprisonment, or both, as the court before which the conviction may take place shall adjudge; and every person who shall assist any deserter from his majesty's service, knowing him to be such, in deserting or concealing himself from such service, shall forfeit, for every offence, the sum of 20l."

(a) See *Rex v. Read*, 16 East, 404.

And by § 24, "Every commissioned officer who shall, without consent from one or more justices, forcibly enter or break open the dwelling-house or outhouses of any person whatever, under pretence of searching for deserters, shall, upon due proof thereof, forfeit the sum of 20l."||

(F) Of the Military Punishments to which Soldiers are liable.

||By the 10 G. 4, c. 6, § 1, (the Mutiny Act,) after reciting, that whereas the raising or keeping a standing army within this kingdom in time of peace, unless it be with consent of parliament, is against law: and whereas it is judged necessary by his majesty and this present parliament, that a body of forces should be continued for the safety of this kingdom, the defence of the possessions of the crown, and the preservation of the balance of power in Europe; and that the whole number of such forces should consist of 89,723 men, exclusive of the officers and men belonging to the regiments employed in the territorial possessions of the East India Company, but including the officers and men of the troops and companies recruiting for those regiments; and whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of this realm; yet nevertheless, it being requisite for the retaining such forces in their duty that an exact discipline be observed, and that soldiers who shall mutiny or stir up sedition, or desert his majesty's service, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow, it is enacted, 'That if any person who is or shall be commissioned or in pay as an officer, or who is or shall be listed or in pay as a non-commissioned officer or soldier, shall at any time during such continuance of this act, begin, excite, cause, or join, in any mutiny or sedition in his majesty's land or marine forces, or shall not use his utmost endeavours to suppress the same, or, coming to the knowledge of any mutiny or intended mutiny, shall not without delay give information thereof to his commanding officer, or shall misbehave himself before the enemy, or shall shamefully abandon or deliver up any garrison, fortress, post, or guard, committed to his charge, or which he shall be commanded to defend, or shall compel the governor or commanding officer of any garrison, fortress, or post, to deliver up to the enemy or abandon the same, or shall speak words or use any other means to induce such governor or commanding officer, or others, to misbehave before the enemy, or shamefully to abandon or deliver up any garrison, fortress, post, or guard, committed to their respective charge, or which he or they shall be commanded to defend, or shall leave his post before relieved, or shall be found sleeping on his post, or shall hold correspondence with, or give advice or intelligence to, any rebel or enemy of his majesty, either by letters, messages, signs, or tokens, in any manner or way whatever, or shall treat or enter into any terms with such rebel or enemy, without his majesty's license, or the license of the general or chief commander, or shall strike or use any violence against his superior officer being in the execution of his office, or shall disobey any lawful command of his superior officer, or shall desert his majesty's service; all persons so offending, whether within this realm or in any other of his majesty's dominions, or in foreign parts, upon land or upon sea, shall suffer death, or such other punishment as by a court-martial shall be awarded.'

By § 4, his majesty may make articles of war for the better government of his majesty's forces, (a) which articles shall be judicially taken notice of by all judges, and in all courts whatever; and copies of the same, printed by the king's printer, shall be transmitted by the secretary at war to the judges of the superior courts at Westminster, Dublin, and Edinburgh, and to the governors of his majesty's dominions abroad: provided, that no

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person within the United Kingdom of Great Britain and Ireland, or the British Isles, shall be subject by such articles of war to any punishment extending to life or limb for any crime which is not expressed to be so punishable by this act, nor in any manner, or under any regulations which shall not accord with the provisions of this act.

(a) See *Rex v. Suddis*, 1 East, R. 306; *Blake's case*, 2 Maul. & S. 428.

(As to the constitution of Courts-martial, see § 5 & 6 of the act, and *McArthur on Courts-martial*, *passim*.)

By § 7, a general court-martial (a) may sentence a soldier to imprisonment, solitary or otherwise, and with or without hard labour, in any public prison or other place which such court may appoint, to corporal punishment not extending to life and limb, and to forfeiture of all advantage as to additional pay, or pension on discharge, for immorality, misbehaviour, or neglect of duty; and whensoever any general court-martial by which a deserter shall have been tried and convicted, shall not think the offence deserving of capital punishment, such court-martial may, instead of awarding a corporal punishment, adjudge the offender, according to the nature of the offence, to be transported as a felon for life, or for a certain term of years; or may sentence him to general service as a soldier in any corps, and in any country or place which his majesty shall direct; or may, if such offender have enlisted for a limited term of years, sentence him to serve for life as a soldier in any corps which his majesty shall please to direct; and the court may, in addition to any other punishment, sentence such offender to forfeit all advantage as to increase of pay, or as to pension on discharge, which might otherwise have accrued to such offender: provided that, in all cases where a capital punishment shall have been awarded by a general court-martial, it shall be lawful for his majesty, instead of causing such sentence to be carried into execution, to order the offender to be transported as a felon, either for life or for a certain term of years, as to his majesty shall seem meet; and if any person transported as a felon, whether in pursuance of the original sentence of the court-martial or in pursuance of such order from his majesty, shall afterwards return or be found at large, without leave from his majesty, or other lawful authority, within any part of his majesty's dominions abroad or at home, other than the place to which he shall have been transported, before the expiration of the term limited by such sentence or order, and shall be duly convicted thereof, shall suffer death as a felon.

(a) Courts-martial are bound by the same rules of evidence as the courts of Common Law, and their general proceedings, when not regulated by act of parliament, must follow the same course. 1 East, 313, n.; *Case of the Mutineers of the Bounty*, *McArthur*, v. 2, 128. The receiving pay as a soldier subjects the party to military jurisdiction. *Grant v. Gould*, 2 H. Bl. 69.

And by § 8, it is enacted, "That every paymaster or other commissioned officer of his majesty's forces, or any person employed in the ordnance or commissariat department, or in any manner in the care or distribution of any money, provisions, forage, or stores, who shall embezzle or fraudulently misapply, or be concerned in or connive at the embezzlement, fraudulent misapplication, or damage of any money, provisions, forage, arms, clothing, ammunition, or other military stores belonging to his majesty's forces, or for his use, may be tried for the same by a general court-martial, which may adjudge any such offender to be transported as a felon for life, or for any certain term of years, or to suffer such punishment of fine, im-

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prisonment, dismissal from his majesty's service, and incapacity of serving his majesty in any office, civil or military, as such court shall think fit, according to the nature and degree of the offence; and every such offender shall, in addition to any other punishment, make good, at his own expense, the loss and damage sustained, which shall have been ascertained by such court-martial; and the loss and damage so ascertained shall be a debt to his majesty, and may be recovered in any of his majesty's courts at Westminster," &c.

And by § 9, "A district or garrison court-martial shall consist of not less than nine commissioned officers, and may in like manner try offences, and sentence any non-commissioned officer or soldier to imprisonment, solitary or otherwise, and with or without hard labour, in any public prison or other place which such court may appoint; and also to corporal punishment, (not extending to life or limb,) and to forfeiture of all advantages as to additional pay, or to pension on discharge, in addition to any other punishment for desertion, for purloining or selling government stores, for stealing from a comrade or from a military officer, for producing false or fraudulent accounts or returns, whereby increased expense has been or would be brought upon the public, for embezzlement or misapplication of money intrusted to him, for which offences such soldiers may further be put under stoppages till the same be made good, or for such disgraceful conduct as shall induce the said court-martial to recommend such offender to be discharged as unfit for the service, from vice or misconduct, he having been once previously convicted of disgraceful conduct by a court-martial; and any district or garrison court-martial may deprive a soldier of the allowance in lieu of beer, or of additional pay, for any period not exceeding two years, for habitual drunkenness: provided that, in all the foregoing cases, the sentence shall be confirmed by the general officer, governor, or senior officer in command of the district or garrison, island or colony, except in cases of mutiny, when the sentence may be confirmed and carried into execution on the spot by the officer in immediate command of the troops; and the president of every court-martial, other than a general court-martial, not being under the rank of captain, shall be appointed by the officer convening such court-martial; provided that such court-martial shall not have power to pass any sentence of death or transportation."

And by § 11, it is enacted, "That it shall be lawful for any officer commanding any distinct detachment or portion of his majesty's troops, which may at any time be serving out of his majesty's dominions, upon complaint made to him of any offence committed against the person or property of any inhabitant of or resident in any such countries, by any person serving with or belonging to his majesty's armies, being under the immediate command of such officer, to summon and cause to assemble a court-martial, which shall consist of not less than three officers, for the purpose of trying any such person, notwithstanding any such officer shall not have received any warrant empowering him to assemble courts-martial, and every such court-martial shall have the same powers in regard to summoning and examining witnesses, trial of and sentence upon offenders, as are granted by this act to general courts-martial; provided, that no sentence of any such court-martial shall be executed until the general commanding in chief the army of which the division, brigade, detachment, or party, to which any person

(F) Military Punishments to which Soldiers are liable.

so tried, convicted and adjudged to suffer punishment, shall belong, shall have approved and confirmed the same."

By § 17, it is enacted, "That whenever it is intended that a person convicted of desertion shall be transported, either in pursuance of the original sentence of a court-martial or of his majesty's gracious order of commutation, the sentence of the court-martial, together with his majesty's pleasure upon the same, shall be notified in writing by the officer commanding in chief his majesty's forces in Great Britain and Ireland, or, in the temporary absence of such officer, by the adjutant-general, to any judge of the King's Bench, Common Pleas, or Exchequer, in England or Ireland; and thereupon such judge shall make an order for the transportation of such offender in conformity with such notification: and shall also do all such other acts consequent upon the same, as such judge is authorized to do by any act in force touching the transportation of other offenders; and the persons in whose custody such offender shall at that time be, and all other persons whatsoever, whom the order may concern, shall be bound to obey, and shall be assistant in the execution thereof, and shall be liable to the same punishment for disobedience, or for interrupting the execution of the same, as if the order had been made under the authority of any such act as aforesaid; and every person so ordered to be transported shall be subject to every provision made by law and in force concerning persons convicted of any crime and under sentence of transportation; and from the time when such order of transportation shall be made, every act now in force touching the escape of felons shall apply to such offender, and to all persons aiding or abetting, contriving or assisting, in any escape or intended escape of any such offender; and the justice or baron who shall make any order of transportation as aforesaid shall direct the notification of his majesty's pleasure, and his own order made thereupon, to be filed and kept of record in the office of the clerk of the crown of the Court of King's Bench, and the said clerk shall have a fee of 2s. 6d. only for filing the same, and shall, on application, deliver a certificate in writing, (not taking more than 2s. 6d. for the same,) to such offender, or to any person applying in his or in his majesty's behalf, showing the Christian and surname of such offender, his offence, the place where the court was held before whom he was convicted, and the conditions on which the order of transportation was given, which certificate shall be sufficient proof of the conviction and sentence of such offender; and also of the terms on which such order for his transportation was given in any court, and in any proceeding wherein it may be necessary to inquire into the same."

By § 19, all crimes and offences committed against any act for punishing mutiny and desertion, and for the better payment of the army and their quarters, or against any of the articles of war, established by virtue of the same, may, during the continuance of this act, be inquired of and punished in like manner as if they had been committed against this act: provided that no person shall be tried and punished for any offence against any of the said acts or articles of war, which shall appear to have been committed more than three years before the issuing of the commission or warrant for such trial, unless the person accused, by having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period, in which case he may be tried within two years after the impediment has ceased.||

(G) Of the Civil Punishments to which Soldiers are liable.

||By 10 G. 4, c. 6, § 2, (the Mutiny Act,) it is enacted, that nothing therein contained shall be construed to exempt any officer or soldier from being proceeded against by the ordinary course of law; and any commanding officer who shall neglect or refuse, when application is made to him for that purpose, to deliver over to the civil magistrate any officer or soldier accused of any capital crime, or of any violence or offence against the person, estate, or property of any of his majesty's subjects which is punishable by the known laws of the land, or shall wilfully neglect or refuse to assist the officers of justice in apprehending such offender, shall, upon conviction thereof in any prosecution in any of his majesty's courts at Westminster, Dublin, or Edinburgh, be deemed to be *ipso facto* cashiered, and shall be utterly disabled to hold any civil or military office or employment within the United Kingdom of Great Britain and Ireland, or in his majesty's service; and a certificate thereof shall be transmitted to the Judge Advocate in London; provided that no person being acquitted or convicted of any capital crime, violence or offence, by the civil magistrate, or by the verdict of a jury, shall be liable to be punished by a court-martial for the same, otherwise than by cashiering.

And by § 43, it is enacted, "That no soldier shall be entitled to pay during his absence from duty in his majesty's service in consequence of any offence, civil or military, or any imprisonment under any sentence of any court, or by reason of any arrest for debt, or as a prisoner of war; provided that any non-commissioned officer, or soldier, acquitted of the offence for which he was committed, shall upon return to his duty be entitled to receive all arrears of pay growing due during his confinement; and upon rejoining his majesty's service from being a prisoner of war, due inquiry shall be made by a court-martial, and if it shall be proved to the satisfaction of such court that the said soldier was taken prisoner without wilful neglect of duty on his part, and that he hath not served with or under, or in any manner aided the enemy, and that he hath returned as soon as possible to his majesty's service, he may thereupon be recommended by such court to receive either the whole of such arrears of pay or a proportion thereof; and no soldier who shall have been confined under any legal sentence shall be allowed to reckon towards pay or pension any part of the period from the day of his first commitment to the day of rejoining his corps: provided that it shall be lawful for his majesty's secretary at war to order or withhold the payment of the whole or any part of the pay of any officer or soldier during the period of his confinement, whether before or after conviction, or to issue any part of the pay of a prisoner of war which he may think proper."

By § 63, it is enacted, "That any person who shall knowingly detain, buy, exchange, or receive from any soldier or deserter, or any other person, on any pretence whatsoever, or shall solicit or entice any soldier, knowing him to be such, to sell any arms, ammunition, clothes, or military furniture, or any provisions, or any sheets or other articles used in barracks, provided under barrack regulations, or any regimental necessities, or any article of forage provided for any horses belonging to his majesty's service, or shall change the colour of any clothes as aforesaid, shall forfeit for every offence the sum of 10*l.*, together with treble the value of all or any of the several articles of which such offender shall so become possessed."

By § 64, "All the persons (except such recruiting parties as may be

(G) Civil Punishments to which Soldiers are liable.

stationed under military command) who shall cause to be advertised, posted, or dispersed, bills for the purpose of procuring recruits or substitutes for the line, imbodyed militia, or East India Company's service, or shall open or keep any house, place of rendezvous, or office, or receive any person therein under such bill or advertisement as connected with the recruiting service, or shall directly or indirectly interfere therewith, without permission in writing from the adjutant-general, or from the directors of the East India Company, (as the case may be,) shall forfeit for every such offence the sum of 20*l*."

By § 65, every person not being an authorized army agent, who shall negotiate or act as agent for and in relation to the purchase, sale, or exchange of any commission in his majesty's forces, shall forfeit for every such offence 100*l*.; and every person, whether authorized or not as an army agent, who shall receive any money or reward in respect of any such purchase, sale, or exchange, or shall negotiate or receive, for any purpose whatsoever, any money or consideration where no price is allowed by his majesty's regulations, or any money or consideration exceeding the amount so allowed, shall forfeit 100*l*., and treble the value of the consideration, where the commission is not allowed to be sold, or treble the excess of such consideration beyond the regulated price.

By § 66, for the better preservation of game and fish in or near such places where any officers shall at any time be quartered, it is enacted, that every officer who shall, without leave in writing from the persons entitled to grant such leave, take, kill, or destroy any game or fish within the United Kingdom, and upon complaint thereof shall be upon oath of one or more credible witnesses convicted before any such justice, shall for every such offence forfeit the sum of 5*l*.; and by § 73, all penalties and forfeitures by this act imposed, not exceeding 20*l*. over and above any forfeiture of value or treble value, may be recovered under the provisions of an act of 3 Geo. 4, intituled *An act to facilitate summary proceedings before justices of the peace and others*; and another act of the 5th Geo. 4, intituled *An act for the more effectual recovery of penalties before justices and magistrates, on conviction of offenders, for facilitating the execution of warrants by conviction*, and all penalties and forfeitures exceeding 20*l*. shall be recovered by action in some court of record.||

By the 19 Geo. 2, c. 21, § 5, it is enacted, "That in case any common soldier, belonging to any regiment in his majesty's service, shall be convicted of profane cursing or swearing, and shall not immediately pay down the penalty by him forfeited, or give security for the same, and also the cost of the information, summons, and conviction, as in and by this act is directed, every such common soldier, instead of being committed to the house of correction, as by this act is directed, shall by the said justice, mayor, bailiff, or other head officer, be ordered to be publicly set in the stocks for the space of one hour for every single offence; and for every number of offences whereof he shall be convicted at one and the same time, two hours."

By the 39 Eliz. c. 17, § 2, after reciting that divers lewd and licentious persons, contemning both laws, magistrates, and religion, have of late days wandered up and down in all parts of this realm under the name of soldiers, abusing the title of that honourable profession to countenance their wicked behaviours, and do continually assemble themselves in the highways and elsewhere in troops, to the great terror and astonishment of her

(H) Liberty given to Soldiers of exercising Trades.

majesty's true subjects, the impeachment of her laws, and the disturbance of the peace and tranquillity of this realm ; and that many heinous outrages, robberies, and horrible murders are daily committed by these dissolute persons, and unless some speedy remedy be had, many dangers are like by these means to ensue and grow towards the commonwealth, it is enacted, " That all idle and wandering soldiers, or idle persons, which now are or hereafter shall be wandering as soldiers, shall settle themselves in some service, labour, or other lawful course of life, without wandering, or otherwise repair to the places where they were born, or to their dwelling-places, if they have any, and there remain, betaking themselves to some lawful course of life as aforesaid, upon pain that all persons offending contrary to this act, to be reputed as felons, and to suffer as in case of felony, without benefit of clergy."

By § 3, it is enacted, " That every idle and wandering soldier, which, coming from his captain from the seas or beyond the seas, shall not have a testimonial under the hand of some one justice of the peace of or near the place where he landed, setting down therein the place and time when and where he landed, and the place of his dwelling or birth unto which he is to pass, and a convenient time therein limited for his passage, or, having such testimonial, shall wilfully exceed the time therein limited above fourteen days; and also as well every such idle and wandering soldier as every idle person wandering as a soldier, which shall at any time hereafter forge or counterfeit any such testimonial, or have with him or them any such testimonial forged or counterfeited as aforesaid, knowing the same to be counterfeited or forged; in all these cases, every such act or acts to be felony, and the offenders to suffer as aforesaid, without benefit of clergy."

By § 4, it is enacted, " That it shall be lawful for the justices of assize, justices of jail delivery, and the justices of peace of every county, and for all justices of peace of towns corporate, having authority to hear and determine felonies, to hear and determine all such offences in their general sessions; and to execute the offender which shall be convicted before them, as in cases of felony is accustomed; except some honest person, valued at the last subsidy next before the time to ten pounds in goods, or forty shillings in lands, or else some honest freeholder as by the said justices shall be allowed, will be contented, before such justices as such person shall be arraigned of felony, to take him or them into his service for one whole year then next following, and then before the said justices will be bound by recognisance of ten pounds, to be levied of his lands, goods, tenements, and chattels, to the use of our sovereign lady the queen, if he keep not the said person or persons for one whole year, and bring him to the next sessions for the peace and jail delivery next ensuing after the said year; and if any such person retained depart within the year, without the license of him that so retaineth him, then he to be indicted, tried, and adjudged as a felon, and not to have the benefit of his clergy."

(H) Of the Liberty given to Soldiers of exercising Trades.

By the 24 Geo. 3, sess. 2, c. 6, § 1, ||extended by 42 Geo. 3, c. 69; 56 Geo. 3, c. 67, to those who have served up to the passing of the last-mentioned act;|| after reciting, that there are divers officers and soldiers who have served his majesty, some of which are men that used trades, others that were apprentices to trades who had not served out their times,

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and others who by their own industry have made themselves apt and fit for trades; many of which would willingly employ themselves in those trades which they were formerly accustomed to, or which they are apt or able to follow and make use of; but are or may be hindered from exercising those trades in certain cities or corporations, and other places within this kingdom, because of certain by-laws and customs of those places, and of the statute made in the fifth year of Queen Elizabeth, it is enacted, "That all such officers and soldiers, who have been at any time employed in his majesty's service since the first day of April, 1763, and have not since deserted the said service, and also the wives and children of such officers and soldiers, may set up and exercise such trades as they are apt and able for, in any town or place within the kingdoms of Great Britain and Ireland, without any let, suit, or molestation, of any person or persons whatsoever, for or by reason of the using such trades; [nor shall such officers or soldiers, or their wives or children, during the time they shall exercise such trades, be removable from such respective place or places to their last legal place of settlement, until such persons shall become actually chargeable to such parish or place;] and if any such officer or officers, soldier or soldiers, shall be sued, impleaded, or indicted in any court within this kingdom, for using or exercising any such trade as aforesaid, then the said officer or officers, soldier or soldiers, making it appear to the same court where they are so sued, impleaded, or indicted, that they have served the king's majesty as aforesaid, [or that he, she, or they, is or are the wife or wives, child or children of such officer or officers, soldier or soldiers, who shall have so served,] shall upon the general issue pleaded be found not guilty in any plaint, bill, information, or indictment exhibited against them; and such person or persons, who notwithstanding this act shall prosecute their said suit by bill, plaint, information, or indictment, and shall have a verdict pass against them, or become nonsuit therein, or discontinue the said suit, shall pay unto such officer or officers, soldier or soldiers, [or the wife or child of such officer or soldier,] double costs of suit, to be recovered as any other costs at common law may be recovered; and all judges and jurors before whom any such suit, information, or indictment shall be brought, and all other persons whatsoever, are to take notice of this act, and shall conform themselves thereunto, any statute, law, ordinance, custom, or provision to the contrary in any wise notwithstanding."

[By § 4, this act is extended to all officers and soldiers who have been drawn by ballot, and have personally served in the militia, or any fencible regiments, from the 1st day of April, 1763, for the term of three years, and have been honourably discharged.]

By 22 G. 2, c. 44, § 2, it is provided, "That this act shall not in any wise be prejudicial to the universities of Oxford or Cambridge, or either of them; or extend to give liberty to any person to set up the trade of a vintner, or to sell any wine or other liquors, within the said universities, without license had and obtained from the vice-chancellors of the same respectively."

[But this exception does not appear in the above act of 24 Geo. 3, sess. 2, c. 6. However, in the general militia act of 26 Geo. 3, c. 107, it is referred to in the section which authorizes militia-men, who have been drawn out into actual service, being married, to exercise trades.]

In an action *qui tam* for exercising the trade of a saddler, it appeared that the defendant, who had not served an apprenticeship to that trade, had

(I) Officers' Liabilities and Authorities.

been one of the Blackwell Hall volunteers, who associated themselves during the late rebellion; and that by one article of their association, they were not to put themselves under the command of any officer appointed by his majesty, or to be subject to military discipline, until the rebels came within sixty miles of London. As this never did happen, and consequently they were never in fact under the command of any officer appointed by his majesty, or subject to military discipline, the question was, Whether the defendant did thereby acquire a right under the 22 Geo. 2, c. 44, of exercising the trade of a saddler? It was holden that he did not; and by Lord Mansfield, C. J.—We should have been glad to have found the present defendant within the meaning of the statute of the twenty-second of the king: but that statute does only extend to such as have been soldiers; and no man is to be deemed a soldier unless he has been actually enlisted and had the articles of war read to him.

MS. Rep. *Mott v. Williams*, East. 31 G. 2, in K. B.

||(I) Officers' Liabilities and Authorities.||

||THE captain of a troop, during his absence from it, and while another officer is in command, by whom the orders for subsistence are given and the subsistence-money received from government, is not liable to pay for subsistence furnished the men, though still entitled to a profit upon the sum issued on that account, and though the troop still continued under his military orders.

Myrtle v. Beaver, 1 East, 135.

And though the captain is present with his troop, and the goods are ordered by a clerk appointed by him, he is not liable in an action for money had and received, unless he has *actually received* the money to pay for the goods from the paymaster on whom the captain is entitled to draw; but it is otherwise if he has actually received the money.

Rice v. Chute, 1 East, 579; *Ibid.* *in notd.*

It is not incident to the office of commander-in-chief of a squadron to have authority to hold a court-martial.

Johnstone v. Sutton, 1 Term R. 548, 784.

If a superior officer imprison an inferior officer for disobedience to an order made under colour, but not within the scope, of his military authority, he is liable to an action of trespass at suit of such inferior officer; and this, although the imprisonment be followed by a trial by court-martial.

Warden v. Bailey, 4 Taunt. 67.

The colonel of a regiment has no authority to order his serjeant to pay money towards lighting and warming a regimental school, and school-master's salary.

Warden v. Bailey, 4 Taunt. 67.

If an officer in imprisoning a soldier acts under the orders of his commanding officer, he can justify the imprisonment, if it were justifiable on the part of the commanding officer.

Bailey v. Warden, 4 Maule and S. 400.

It is justifiable in a commanding officer to imprison a soldier in order to bring him to a court-martial, under the 22d section of the articles of war, for uttering words amounting to disorderly conduct, "to the prejudice of good order and military discipline," within the 24th section of the articles.

(I) Officers' Liabilities and Authorities.

(Art. 2.) And although the court-martial terminate in the acquittal of the soldier, this does not deprive the officer of the justification which he would have had in another event of the trial, if there was a reasonable and probable cause for the imprisonment until trial.

Bailey v. Warden, 4 Maule and S. 400.

A, being a commissioned officer on full pay in a regiment, was appointed civil superintendent of Honduras, a dependency of the island of Jamaica, and at the same time was appointed, by the commander-in-chief in Jamaica and its dependencies, to the command of such of his majesty's subjects as then were armed or might arm for the defence of the settlers in the colony; held, that this appointment to command all persons armed in defence of the settlers in the colony vested in him the right to command the military forces there.

Bradley v. Arthur, 4 Barn. and C. 292. See Barwis v. Keppel, 2 Wils. R. 314.

After A had acted as military commander there for some years, the regiment in which he held a commission was disbanded, and he was put on half-pay.(a) Both before and after the disbanding of the regiment, he acted as military commander and civil superintendent of the colony, and he was recognised as filling both characters by the authorities at home; held, that although by the disbanding of the regiment he lost his command and regimental rank, still his right to command the king's troops continued, that right being recognised by his majesty through the authorities representing him at home; and consequently A was held justified in putting under arrest, for disobedience of orders, a commissioned officer on full pay, holding equal regimental rank with himself.

(a) An officer on half-pay is not subject to trial by court-martial. See opinion of the Judges, M'Arthur on Courts Martial, v. 1, 196; and see Bowler v. Owen, Barnes's Notes, 432. But it is otherwise as to officers holding brevet commissions. M'Arthur, v. 1, 201.

Neither the full nor future half-pay of a military officer is assignable.

Lidderdale v. Montrose, 4 Term R. 248; and see 3 Term R. 681; 1 H. Black. 627; 2 Anst. 533.||

It is said that, as an agent of a regiment is but a servant to the colonel, his receipt can only charge the colonel; there being no privity between the king and him.

Ld. Raym. 101, Beaumont v. Pine.

In an action of *assumpsit*, the plaintiff declared that he was and yet is captain of a company of soldiers, and that the defendant, in consideration that the plaintiff would permit A B, a soldier in his company, to be absent ten days, promised the plaintiff to bring back the said A B at the end of ten days, or to pay him 20*l.*; it was objected, that there is not in this case any consideration to support the action; for that the captain of a company has not such property in a soldier, thereunto belonging, as to give him leave to absent himself from the king's service: but by the court—When a captain has no occasion to employ a soldier in the king's service, he may give him leave to be absent for a reasonable time, such leave being a benefit to the soldier.

Ld. Raym. 312, Taylor v. Jones.

||By 10 Geo. 4, c. 6, § 67, no officer residing in barracks or elsewhere, under military law, shall be liable to have any parish poor child bound apprentice to him.||

(K) Of divers Things, which did not fall under any of the foregoing Heads.

||PROBATE OF WILLS.|| By the 5 W. & M. c. 21, and by the 9 & 10 W. 3, c. 25, § 19, it is provided, "That nothing in these acts contained shall extend to charge the probate of any will or letters of administration of any common soldier, who shall be slain or die in his majesty's service, a certificate being produced from the captain of the troop or company under whom such soldier served at the time of his death, and oath made of the truth thereof before the proper judge or officer by whom such probate or administration ought to be granted; which oath such judge or officer is hereby authorized and required to administer, and for which no fee or reward shall be taken."

||By the last stamp act, 55 Geo. 3, c. 184, schedule, part 3, the probate of the will, letters of administration, and inventory of the effects of any common seaman, marine, or soldier who shall be slain or die in service, shall be exempted from the stamp duties imposed by the act.

SOLDIERS' DEBTS.—By 58 Geo. 3, c. 73, § 1 & 2, all sums of money due in respect of any military clothing, appointments and equipments, or of any quarters, mess, or regimental accounts, or which shall be due to any agent, paymaster or quarter-master, or any other officer, on any such account, or on account of any advances made for any such purpose, shall be deemed regimental debts, and paid out of any arrears of pay, or out of the effects or any prize or bounty-money of any officer or soldier dying while in service, in such proportion or priority as shall be ordered by the secretary at war for the time being, and in preference to any other debts, claims, or demands upon the estate and effects of such officer or soldier; and if any doubt arise whether any claim or demand made be a regimental debt, such question shall be decided by the order or certificate of the secretary at war, who is authorized to cause all surplus which may remain after satisfying such regimental debts to be paid to the persons entitled thereto.

By § 3, all such regimental debts shall be paid without any probate of any will or letters of administration being obtained, and the surplus only of such arrears of pay and proceeds of any such effects shall be deemed the personal estate of the deceased, or the payment of any duty or for distribution as personal estate. And the secretary at war may direct the distribution of any surplus not exceeding 20*l.* without any probate or letters of administration, or payment of any duty of stamps or upon legacies or otherwise.||

By the 43 Eliz. c. 3, § 2, it is provided, That every parish shall be charged with a weekly sum for the relief of sick, hurt, and maimed soldiers, and there are in the same act directions for applying the money raised for this purpose: but as the practice is at this day to leave such soldiers to be provided for by the respective parishes to which they belong, it is unnecessary to mention those directions.

The ancient method of taxing parishes for the relief of soldiers is now disused. ||As to the provisions of Chelsea Hospital, see 46 G. 3, c. 69; 47 G. 3, sess. 2, c. 25; Burn's Just. tit. *Military Law*, [13.] (25th ed.)||

||EXAMINATION AS TO SETTLEMENTS.—By 10 Geo. 4, c. 6, § 68, any justice in the United Kingdom within whose jurisdiction (*a*) any soldier having a wife or child shall be billeted, may summon such soldier before him in the place where he is billeted, (which summons he is directed to obey,) and take his examination in writing upon oath, touching the place of his last legal settlement in England, and such justice shall give an

Stamps.

attested copy of such examination to the person examined, to be by him delivered to his commanding officer, to be produced when required; which said examination and such attested copy shall be at any time admitted in evidence as to such last legal settlement before any justice, or at any general or quarter sessions, although such soldier be dead or absent from the kingdom: provided that in case any soldier shall be again summoned to make oath as aforesaid, then on such examination or such attested copy thereof being produced by him, or by any other person on his behalf, such soldier shall not be obliged to take any other oath with regard to his legal settlement, but shall leave a copy of such examination, or a copy of such attested copy of examination, if required. See Burn's Justice, tit. *Poor*, (*Removal*,) vol. iv. (25th edit.)

(a) See the King v. The Inhabitants of All Saints, Southampton, 7 Barn. & C. 785.¶

A lease being forfeited for the non-payment of rent, the lessor brought an ejectment. Hereupon a rule was made, that, upon the defendant's bringing into court what was due for rent, with costs, the proceedings in ejectment should be stayed: but the lessor afterwards obtained another rule for discharging this, unless the defendant, who was a soldier, and therefore entitled to privilege, would give security for the payment of the rent.

10 Mod. 383, *Smith v. Parks*.

STAMPS.

A **STAMP** is a mark affixed to certain instruments, writings, and things.

The use of this mark is to denote, that the duty imposed upon the instrument, writing, or thing, has been paid, or that security has been given for the payment thereof.

[The stamps depend upon a great variety of acts of parliament, the introduction of which into a work of this kind, the editor conceives, would only increase its bulk and its price, without adding to its intrinsic value. Some of those acts were inserted very much at length under this division in the former editions of this work; but they are now withdrawn, and the editor has merely stated the adjudications he has been able to collect upon the subject.]

¶The last general stamp act is the 55 G. 3, c. 184.¶

¶These cases may be arranged under the following heads:—

- (A) Where several Stamps are and are not necessary to one Instrument.
- (B) Of the Time for stamping an Instrument.
- (C) Of the Alteration of an Instrument whereby a fresh Stamp is rendered necessary.
- (D) Of Instruments not within the Stamp Acts, or expressly exempted from Stamp.
- (E) Of the Amount and Denomination of the Stamp.
- (F) Of the Consequences of an Instrument not being duly stamped.¶

[(A) Where several Stamps are and are not necessary to one Instrument.]

UPON a trial at bar of an information in the nature of a *quo warranto*, an instrument stamped with one stamp was offered in evidence, purporting to be the admission of five persons, upon the nineteenth of December one thousand seven hundred and twenty-one, amongst whom the defendant was the third person named. Raymond, C. J., and Fortescue and Reynolds, Js., were of opinion that the instrument ought not to be read; for that if not quite void for uncertainty it could be only good for the admission of the person first named. (a) Then four pieces of parchment, all duly stamped, which purported to be the several admissions of the four persons last named on the said nineteenth day of December, were offered in evidence: but it being proved by the witness producing them, that they were not stamped till two months after the said day, the same three judges were of opinion that, as these parchments were not stamped at the time of the admission, they could not be given in evidence, because no certificate of the payment of the penalties was produced.

Ld. Raym. 1445, *Rex v. Reeks*. [(a) See acc. Dougl. 217. And in the case of *Gilby v. Lockyer*, there reported, it was adjudged, that two or more defendants cannot be holden to bail upon one affidavit, as being a fraud upon the stamp duties.]

{If a number of persons severally bind themselves in a penalty by one bond, conditioned for the performance by each and every of them of the same matter, such bond requires only one stamp. It is but one transaction. So where a debtor compounds with his creditors, and each creditor signs the same deed, every covenant is in fact a separate covenant, and the several deed of each creditor who signs the deed: but the whole being only one transaction, a separate stamp for each person is never required.

4 Bos. & Pul. 274, *Bowen v. Ashley*.}

||But where the subject matter of the instruments is single, there one stamp is sufficient, although the parties may be several, and their interests distinct. As where a debtor compounds with his creditors, and each creditor signs the same deed, covenanting severally. There every covenant is, in fact, a separate covenant, and the several deed of each creditor; but the whole being one transaction, a separate stamp for each person is never required.

1 New. R. 278.

So where a number of persons bind themselves in the same bond, conditioned for the performance by each and every of them of several acts, (e. g. singing and performing at a musical society,) such bond requires only one stamp.

Bowen v. Ashley, 1 New R. 274; and see *Cook v. Jones*, 15 East, 237, and 1 East, 537.

So, also, a joint bill of sale by several mariners belonging to a privateer, of their several shares in the prize-money. So a deed by which a number of individuals agreed to subscribe for constructing a dock, has been held to require only one stamp.

Baker v. Jardine, 13 East, 235, n.; *Davis v. Williams*, 13 East, 232.

So, where underwriters on the same policy agree to refer the demand of the assured to an arbitrator, one stamp for the agreement of reference, and one stamp for the award, are sufficient.

Goodson v. Forbes, 6 Taunt. 171.

So an indenture by which an apprentice was bound for seven years, to

||(A) Where several Stamps necessary to one Instrument.||

serve A B for the first four years, and his own father for the last three, to learn two different trades, was held only to require one stamp, the whole being only one transaction, and no fraud intended.

Rex v. Louth, 8 Barn. & C. 247.

So, where members of a mutual insurance club all executed the same power of attorney, severally authorizing the persons therein named to sign the club policies for them, it was held to require only one stamp.

Allen v. Morrison, 8 Barn. & C. 565.

So, also, where one paper contains several distinct contracts, by several different parties, and is stamped with a single stamp, it will be received as evidence of a contract by one of the parties, if it appear from the position of the stamp, and the cancelling of the other parts of the paper, that the stamp is applicable only to the contract by the party charged.

Powell v. Edmunds, 12 East, 6; *Doe d. Copley v. Day*, 13 East, 241; and see 4 Camp. 80; *Barnes*, 463; *Stead v. Liddard*, 1 Bing. 196; *Boase v. Jackson*, 3 Bro. & B. 185.||

[In ejectment, the plaintiff offered to give in evidence an examined copy of a bill in Chancery, contained in two close sheets of paper, each stamped with treble sixpenny stamps; but the matter was equal in quantity to forty office-copy sheets: and also an examined copy of an amended bill, in three close sheets, each stamped with a treble sixpenny stamp, the matter whereof would have extended to sixty office-copy sheets. By the stamp act, 9 & 10 W. 3, c. 25, § 64, every copy of proceedings in Chancery is charged with a duty of threepenny stamps on each sheet; otherwise it cannot be given in evidence; and it is also provided that all proceedings in any court shall be written in the usual manner. A verdict being obtained for the plaintiff, subject to the opinion of the court whether this evidence ought to have been admitted, it was insisted for the defendant, that the copy meant by the statute was an office-copy. But by Lord Mansfield—When stamps were originally imposed, there were two kinds of copies in common use; one an office-copy, to be made use of in the court to which the cause belonged. This contained only a stated number of words, by immemorial custom, probably introduced to enlarge the fees of the officers. The other, a common close copy to be used when proved in any other court or place. Then comes the act, and lays (in one clause) a duty upon every sheet of copy; and the next clause directs all proceedings in any court to be written in the same manner as before. Is this latter clause a legislative provision that the office-copies only shall be used in evidence where they were not used before? It is not to be conceived that, in order to raise so small a duty, (for originally it was only one penny a sheet,) the legislature intended to put the parties to the expense of 60*l.* to take office-copies, merely to give in evidence. The stamp acts have not always been construed strictly. It has been determined that the stamp duties do not extend to proceedings before either house of parliament.—The postea was delivered to the plaintiff.

1 Bl. Rep. 288; 2 Burr. 1177.]

||A defeasance to a warrant of attorney does not require a separate stamp from that on the warrant of attorney.

Cawthorne v. Holben, 1 New R. 279.||

A warrant of attorney for entering up judgment was written upon a sheet of paper, which likewise contained a bond, and had only one stamp;

||(A) Where several Stamps necessary to one Instrument.||

whereas by the statutes imposing stamp duties it ought to have had two. Judgment having been entered up by virtue of this warrant, the court was moved that the judgment and execution thereupon might be set aside: but by the court—There may be reason to refuse such warrant of attorney in evidence, but there is none to hold it void; for there is nothing in either of the stamp acts which makes it so.

Salk. 612, Anon., Mich. 4 Ann.

This, which is an anonymous case, is very shortly reported; and there was probably some other reason for the judgment; for that mentioned by the reporter is so inconclusive, that the judgment of the court cannot be presumed to have been thereupon founded. It is not easy to conceive a case wherein such warrant of attorney could have been offered in evidence; but to allow the possibility of such a case, if the court would have been of opinion that it would not have been admissible evidence, the judgment entered up upon it seems to be bad; for in the clause of the 5 and 6 of W. and M. c. 21, and of the 9 and 10 W. 3, c. 25, in which it is enacted, "*That no deed, instrument, or writing, shall be pleaded or given in evidence in any court, until the vellum, parchment, or paper on which such deed, instrument, or writing shall be written or made, shall be marked or stamped with a lawful mark or stamp, it is added, or be admitted in any court to be good, useful, or available in law or equity.*"

||A petition in bankruptcy praying distinct orders under several commissions requires several stamps. (N. B. The principal stamp duties on law proceedings are now repealed, by 5 Geo. 4, c. 41.)

Ex parte Wilson, 18 Ves. 439; and see 3 Taunt. 469.

If parties enter into a written agreement, which is duly stamped, and then endorse terms on the back of it, varying the original agreement, such new terms will not be admissible without a new stamp; and as the endorsement of such terms puts an end to the original agreement, the plaintiff cannot recover, either upon the new or the original agreement.

Reed v. Deere, 7 Barn. & C. 261.

By 44 G. 3, c. 98, it is provided, that no single instrument, subject or liable to one specific duty, shall be chargeable under any two or more distinct heads or denominations.

By 55 G. 3, c. 184, (Schedule *Bond*,) it is provided, that where in England a bond for performance of covenants or agreements (other than for the payment or transfer of any sum of money or annuity, or any share in the stocks or funds) shall be contained in the same deed or writing with any other matter or thing, the same shall not be charged separately, but the whole shall be considered as one deed, and be charged accordingly, under its proper denomination.

See 7 Barn. & C. 404.

A deed executed and endorsed on a former deed, as a further security for advances made and to be made under the first deed, is exempted by 48 G. 3, c. 149, from the *ad valorem* stamp, provided the first deed be stamped with the proper *ad valorem* stamp.

Robinson v. Macdonnell, 5 Maul. & S. 228.

The last general stamp act provides, that where *divers letters* shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall suffice if one of them be stamped with a

||(B) Of the Time for Stamping Instruments.||

duty of 1*l.* 15*s.*, although the same shall, in the whole, contain more than twice the number of 1080 words. Upon this act it was held, that where A, by a letter, (in which the consideration of the transaction sufficiently appeared,) entered into an agreement with B, and B became party to the engagement by writing a few lines at the bottom of a copy of A's letter, and C became guarantee for B to A by an endorsement on the back of this copy of A's letter, in which endorsement reference was made to the terms of the agreement on the other side; it was held, that *the whole formed one transaction*, and that one stamp on the *engagement* signed by B was sufficient, and that a distinct stamp on the guarantee signed by C was unnecessary.

Sch. tit. *Agreement*. *Stead v. Liddard*, 1 Bing. 196; 8 Moo. 2; *sed vide Richards v. Franco*, Chitt. on Stamps, p. 19.||

||(B) Of the Time for stamping Instruments.||

UPON a writ of error it appeared from a bill of exceptions, that a patent, which had been given in evidence, was not stamped at the time it was sealed: and the question was, Whether the patent ought to have been admitted as evidence? The whole court were of opinion that, being stamped at the time of the trial, it was admissible evidence; for that the intention of the stamp act (*a*) is not to make unstamped deeds absolutely void, but to add a penalty, which has in the present case been paid, for enforcing the payment of the stamp duty.

Str. 624, *Rex v. The Bishop of Chester*. (*a*) 5 & 6 W. 3, c. 21.

{If an agreement is one upon which no action is to be brought unless it is stamped, it must be stamped before action brought: but if it is an agreement which you may get stamped paying the penalty, there pending the action, and even at the hearing, it may be stamped.

11 Ves. J. 595, *Huddleston v. Briscoe*; 9 Ves. J. 234, 252, *Coles v. Trecothick*. See 2 Term, 609.}

A motion was made to set aside a verdict because a *distringas* was not stamped at the time of the trial; but the solicitor having taken care to get it stamped before the *postea* was brought in, no rule was made; and by the court—As the *distringas* is now stamped, we cannot take notice whether it were so or not at the assize; and if it were not, advantage should have been then taken of the defect.

8 Mod. 226; Anon., Str. 575.

||If an action cannot be brought upon an agreement until it is stamped, it must be stamped before the commencement of the action; but, if it is an agreement which may be stamped on payment of a penalty, then it may be stamped during the action.

9 Ves. 252; 11 Ves. 595.

In some cases the legislature has declared that the paper cannot be stamped after it has been written, as in the 35 Geo. 3, c. 63, § 14, concerning sea insurances, and in 31 Geo. 3, c. 25, § 19, concerning bills of exchange and promissory notes.

Roderick v. Hovil, 3 Camp. 103.

In other cases it is declared that a penalty shall be incurred by writing on an unstamped paper, and that the instrument shall not be available in evidence until the duty and penalty are first paid, and a receipt for them produced, and until the instrument is marked with a proper stamp. Here the defect may be cured by having a proper stamp affixed, which may be

[(B) Of the Time for stamping Instruments.]

done by paying the duty, together with the penalty for not having the instrument stamped within the time limited.

5 & 6 W. & M. c. 21, § 11; 12 Ann. st. 2, c. 9, § 25; 37 G. 3, c. 136, § 2; R. v. Bishop of Chester, 1 Stra. 624.

If an administrator sues for a greater value than is covered by the *ad valorem* stamp on his letters of administration, he cannot recover; and it will not suffice to sue out fresh letters of administration on a larger stamp after he has obtained judgment.

Hunt v. Stevens, 3 Taunt. 113.

In the last case the instrument produced at *the trial* was on an insufficient stamp. But where an action was brought by assignees of a bankrupt under a commission issued on a debt due to the plaintiff as executor of A B, and the probate obtained at the time the commission issued was on an insufficient stamp, but a valid probate on a sufficient stamp was afterwards obtained, the court held, that the probate, after the additional stamp was affixed, made the plaintiff's title perfect by relation, and he was entitled to recover.

Rogers v. James, 7 Taunt. 147; and see Burton v. Kirby, 7 Taunt. 174; Thynne v. Protheroe, 2 Maul. & S. 553.

By the 55 Geo. 3, c. 184, § 49, the commissioners of stamps are authorized to stamp letters of administration *de bonis non*, on security given, and without payment of duty; as well in cases where the duty has been paid on the original letters, as where such letters have been originally stamped on credit.

Doe d. Hanley v. Wood, 2 Barn. & A. 72.||

An apprentice had served three years; but the master had never paid the duty of sixpence in the pound for the money received with him. This case being referred to Fortescue, J., who went the circuit, he was of opinion, that as six months' time was given for the master to pay the duty in, a settlement was during that time gained which could not afterwards be defeated; and the sessions held it to be a settlement. Upon removing the order of sessions it was quashed; and by the court—This would be making the indenture good to one purpose, when by the 8th of Ann. c. 9, § 39, it is declared, that such indenture shall not be good to any purpose whatsoever; and the positive words of an act of parliament, however hard the case is, are not to be broke through.

Str. 903, The Inhabitants of Cureden v. the Inhabitants of Leland. ||Rex v. Chipping Norton, 5 Barn. & A. 412, *acc.*|| [Vide Rex v. Holbeck, Burr. S. C. 198; Rex v. Lanvair Duffryn Clwyd, Ibid. 236, S. P. But where the consideration-money is under 20s., Baxter v. Faulam, 1 Wils. 129; Rex v. Yarmouth, Burr. S. C. 379; where, in the case of a voluntary binding, it is paid by the parish officers (for in that case it comes within the exception in the fortieth section of the act, as *being at the public charge of the parish*); where it is given to any one else than to the master or mistress, Rex v. St. Petrox in Dartmouth, 4 Term R. 196; or where the thing contracted for is not in truth in lieu of money or premium to the master or mistress, Rex v. Leighton, 4 Term R. 732; {1 East 601, The King v. Inh. of Wantage;} the stamp under this act is not necessary.] ||And a stipulation by a master for 4d. out of every shilling of the earnings of the apprentice is not a benefit to him, for which an additional duty must be paid within the statute. Rex v. Wantage, 1 East's R. 601. And where the premium contracted to be paid is inserted in the indenture, and the stamp paid on that sum, it is sufficient, although in fact a less sum was received and taken, Rex v. Keynsham, 5 East, 309; and see 1 Maul. & S. 151, 4 Taunt. 876; and where an indenture of apprenticeship had been executed more than thirty years before, under which the apprentice had regularly served his time of seven years, and the indenture was then given up to him, and proved

||(C) Of the Alteration of Instruments.||

to be lost, and the parish in which he was settled under such indenture had relieved him for the last 12 months; the court held that a sufficient stamp might be presumed, although the proper officers of the stamp duties proved that no such indenture appeared in the office to have been stamped or enrolled during that period. *Rex v. Long Buckby*, 7 East's R. 45.||

||In case of *agreements* not under seal it is particularly provided, that they may be stamped at the head office, or the duty paid thereon, and a receipt given for the same by the proper officer receiving such duty, within twenty-one days after the same shall have been entered into.(a) But all other writings, matters, and things, in respect whereof any duties shall be payable, are to be engrossed on the parchment or paper, *previously* stamped, either upon the stamp, or as near as conveniently may be, under a forfeiture of 10*l.*; and if not so stamped the instrument cannot be given in evidence.(b)

(a) 23 G. 3, c. 38, § 5; 55 G. 3, c. 184. See 5 Bing. 418. (b) 5 W. & M. c. 21, § 10; 9 & 10 W. 3, c. 25, § 19, 59; 1 Ann. st. 2, c. 22, § 5; 3 Taunt. 116.

Bills, notes, and receipts are to be engrossed after the proper stamp has been impressed on the paper, or shall not be given in evidence, or admitted at law or equity to be available.(c)

(c) 23 G. 3, c. 49, § 14.

It is however provided, by 55 Geo. 3, c. 55, § 2, that receipts may be stamped within fourteen days on payment of the duty and 5*l.*, and within a calendar month on payment of the duty and 10*l.*; and a bill or note stamped with a stamp of equal or superior value to that which it ought to have had, but of wrong denomination on the face of it, may be properly stamped, on payment of a penalty, under 37 Geo. 3, c. 136, § 5.||

||(C) Of the Alteration of Instruments, whereby a fresh Stamp is rendered necessary.||

By 1 Ann. st. 2, c. 22, § 2, it is enacted, "That if any person shall write, or cause to be written, part of any writ, mandate, bond, affidavit, or other writing, in respect whereof any duty is payable, on any piece of vellum, &c., whereon there shall have been before written any other writ, &c., in respect whereof any duty is payable, before such vellum, &c., shall be again stamped; or shall fraudulently erase the name of any person, or any sum, date, or other thing, or cut off any stamp from any piece of vellum, &c., with intent to use such stamp for any other writing in respect whereof any duty shall be payable; every person so offending shall forfeit 20*l.* with costs." In an action for the penalty under this act, it was adjudged, that it was incurred by the erasure of names and dates out of a letter of attorney that had been granted by the defendant to collect debts in Newfoundland, and the insertion of others, without getting the instrument restamped.

Stonelake v. Babb, 5 Burr. 2673. ||The 12 G. 3, c. 40, subjects the offenders to transportation for attempting to use the same stamp twice for different purposes, and the 55 G. 3, c. 184, § 7, makes the offence of taking off a stamp, with intent to use it again, felony without clergy.||

A bill of exchange was drawn on a proper stamp, dated 2d September, payable twenty-one days after date. It was afterwards altered, and made payable fifty-one days after date; and on 30th of September, it was again altered to twenty-one days after date, and the date was brought forward to the 14th of September. It was determined, that at the time when the last alteration was made, there ought to have been a new stamp; the

[(C) Of the Alteration of Instruments.]

operation of the bill, as it originally stood, being then quite spent, and this being quite a new and distinct transaction between the parties.

Bowman v. Nichol, 5 Term R. 537. {Vide 8 East, 273, *Kensington v. Inglis*; *Ibid.* 373, *Hill v. Patten*; 9 East, 351, *French v. Patten*.}

¶If a stamped instrument has, in fact, once been issued in a perfect form, and as a valid security, any material alteration in it will render a new stamp necessary. Thus, where a promissory note, payable by defendant to plaintiff or order, was originally expressed to be "for value received," but on the day after it had been delivered by defendant to plaintiff, it was with the consent of the parties altered, by adding the words, "for the goodwill of a lease and trade," the court held the alteration material, and that a new stamp was necessary.

Knill v. Williams, 10 East, 431.

So, a bill, dated the 1st August, drawn payable to the drawer's order and accepted by the drawee, and re-delivered to the drawer, cannot, after being kept by the drawer for twenty days as a security, be altered by bringing forward the date to the 21st of August, without a fresh stamp.

Bathe v. Taylor, 15 East, 412; and see *Cardwell v. Martin*, 9 East, 190; *Walton v. Hastings*, 4 Camp. 223; *Outhwaite v. Luntley*, 4 Camp. 179; *Matson v. Booth*, 5 Maul. & S. 226; *Mackintosh v. Haydon*, 1 Ry. & Moo. 363; *Cowie v. Halsall*, 4 Barn. & A. 197; *Phill. on Evid.* 494, (6th edit.;) and see *Peake's N. P. C.* 127.

But where the drawer of a bill, payable to his own order, endorsed it to A, and A to B, and B, on the bill being dishonoured by the acceptor, returned it to A, to whom the drawer paid the amount and took back the bill; and the names of the two endorsers being struck out, the drawer endorsed the bill to the plaintiff without a new stamp; the court held, that no new stamp was necessary, as the bill was not a new bill, and had never discharged its functions.

Callow v. Lawrence, 3 Maule & S. 95.

An alteration of the date, or the time for which a bill has to run, made before the bill is accepted or negotiated, will not render a new stamp necessary.

Johnson v. Duke of Marlborough, 2 Stark. Ca. 313; *Kennerley v. Nash*, 1 Stark. Ca. 452; *Peacock v. Murrell*, 2 Stark. Ca. 558.

As an accommodation bill does not issue as an available security until it is negotiated for *value*, an alteration previous to that time does not render a new stamp necessary.

Downes v. Richardson, 5 Barn. & A. 674. Vide as to stamps on bills and notes, *Bayley on Bills*, ch. 3, (4th edit.)

It is provided by the 13th sect. of statute 35 Geo. 3, c. 63, relating to stamp duties on sea insurances, that nothing in that act shall extend to prohibit the making any alteration in any policy of insurance duly stamped, or to require any additional stamp by reason of such alteration, so that the alteration be made before notice of the determination of the risk originally insured; and so, that the premiums originally paid, or contracted for, exceed 10s. per cent. on the sum insured; and so, that the thing insured remain the property of the same persons; and so, that the alteration do not prolong the term insured beyond the period allowed by the act; and so, that no additional sum be insured by means of such alteration.

In a case where the policy was on goods and specie on board of ship or ships sailing between the 1st October, 1799, and the 1st June, 1800, being

[(D) Of Instruments not within the Stamp Acts, &c.]

the property which should first sail to a certain amount, and a memorandum was written on the policy, and subscribed by the defendant, of the 11th of June, 1800, before notice of the determination of the risk, agreeing to extend the time of sailing to 1st August following; the court held, that the memorandum did not require a stamp, for no new subject of insurance was introduced.

Kensington v. Inglis, 8 East, 273; and see *Hubbard v. Jackson*, 4 Taunt. 169; *Ridsdale v. Sheddon*, 4 Camp. 107; *Wier v. Aberdein*, 2 Barn. & A. 320; *Ramstrom v. Bell*, 5 Maul. & S. 270.

But where the subject of insurance was originally "ship and outfit," and it was altered by consent of the underwriters to "ship and goods," the court held that the subject of insurance was different, and a new stamp was necessary; and they afterwards held, that the parties could not resort back to the original state of the instrument, and treat it as a policy on "ship and outfit."

Hill v. Patten, 8 East, 373; and see 9 East, 351, *Park on Insur.* 46.

Where the alteration is made with the consent of all parties, merely for the purpose of correcting a mistake, and in order to render the instrument conformable to the original intention of the parties, there a fresh stamp is unnecessary. As where a bill had been drawn payable to the defendant, but without the words "or order," and the defendant, on the day after the bill was drawn, endorsed it over to the plaintiff, and the plaintiff returned it to the defendant to get the omission rectified, and the drawer then inserted the words, the jury having found that the omission was by mistake, and that the words were originally intended to be inserted, the court held the alteration allowable, and that a new stamp was not necessary.

Kershaw v. Cox, 3 Esp. N. P. C. 246; 10 East, 453; *Jacobs v. Hart*, 2 Stark. N. P. C. 45; *Robinson v. Touray*, 1 Maul. & S. 217; *Robinson v. Tobin*, 1 Stark. N. P. C. 336; *Doe v. Houghton*, 1 Mann. & Ry. 208; *Farquhar v. Southey*, 1 Moo. & Malk. 14.

So, the conversion of a promissory note into a bill of exchange, pursuant to an original agreement between the parties, that a bill of exchange should be given, has been held allowable without a fresh stamp, the instrument having never been negotiated as a promissory note.

Webber v. Maddock, 3 Camp. 1.

So, where the bill of sale of a ship, in reciting the certificate of registry, incorrectly stated Guernsey as the port where the certificate was granted, instead of Weymouth, and the mistake was afterwards rectified by assent of the parties, and the deed delivered afresh, it was held that a new stamp was unnecessary; for the instrument in its original state, by reason of the mistake, was void by the 26 G. 3, c. 60, § 17, and the alteration only made it what the parties originally intended.

Cole v. Parkin, 2 East, 471; and see *Sawtell v. Loudon*, 5 Taunt. 359.

A writ may be altered as to the return day before it is returnable, without a fresh stamp, provided no term intervenes between the teste and the day on which it is ultimately made returnable.

Durden v. Hammond, 1 Barn. & C. 111.]

[(D) Of Instruments not within the Stamp Acts, or expressly exempted from Stamp.]

[THE statute 55 Geo. 3, c. 184, the last general act relating to stamp duties, enacts, that every agreement, minute, or memorandum of agreement, (not particularly exempted,) made in England under hand only, or

¶(D) Of Instruments not within the Stamp Acts, &c.¶

made in Scotland without any clause of registration, is liable to a stamp in proportion to the number of words contained, when the subject-matter is of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory on the parties from its being a written instrument.

Schedule, Part I. *Agreement.*

A written memorandum delivered by the auctioneer to the bidder to whom lands are knocked down to be let, containing a description of the lands, the terms of the letting, and the rent payable, but not signed by the auctioneer, or any of the parties, is not such a minute of the agreement as requires stamping; but if signed by the auctioneer, it ought to be stamped.

Ramsbottom v. Tunbridge, 2 M. & S. 435; *Ingram v. Lea*, 2 Camp. 521; *Adams v. Fairbairn*, 2 Stark. Ca. 277; *Ramsbottom v. Mortley*, 2 Maul. & S. 445.

A memorandum, "Received of L and Co. a paper parcel, directed to Messrs. H B, value 260*l.*, which we agree to deliver to them, &c., carriage paid here," given by a carrier on receipt of goods, is admissible in evidence as an agreement without stamp; the subject-matter, viz., the carriage, being under 20*l.*

Latham v. Rutley, Ry. & Moo. Ca. 13; and see *Ibid.* p. 15.

A mere *proposal* by one party, without the accession of the other, is not an agreement requiring stamp.

Drant v. Brown, 3 Barn. & C. 665; and see 3 Barn. & A. 326; 1 Stark. Ca. 464; 2 *Ibid.* 475.

A mere acknowledgment, "Mr. J has left in my hands 200*l.*," requires no stamp.

Tomkins v. Ashby, 6 Barn. & C. 541.

So, also, a mere I O U.

1 Camp. 499; 1 Dow. & Ry. N. P. Ca. 8; 3 Stark. Ca. 3.

So, also, an admission, "I have in my hands three bills which amount to 120*l.*, which I have to get discounted or return on demand."

Mullet v. Hutchison, 7 Barn. & C. 639; and see 2 Mann. & Ry. 10, 167.

So, also, a broker's note delivered by a broker to his principal, containing an account of a purchase of goods for him, and the price paid, does not require any stamp.

Tomkins v. Savory, 9 Barn. & C. 704.

If A agree by parol to let to B certain premises on the conditions contained in a certain lease, and A sue B on the agreement, the lease cannot be read in evidence unless it be duly stamped.

Turner v. Power, 7 Barn. & C. 625.

A contract of marriage may be proved by unstamped letters, the statute applying only to such matters as are the subject of pecuniary calculation.

Orford v. Cole, 2 Stark. 351.

If a receipt for money be written on the same paper with an agreement, the paper is admissible in evidence as a receipt, with a receipt stamp, though without an agreement stamp; and, if a receipt stamp specify the consideration for which the money is paid, it may be evidence of such consideration without an agreement stamp.

Grey v. Smith, 1 Camp. 387; *Watkins v. Hewlett*, 1 Bro. & B. 1; *sed vide Corder v. Drakeford*, 3 Taunt. 381.

And, a receipt for the price of a horse, containing a warranty of soundness, is evidence to prove the warranty, without an agreement stamp.

Skrine v. Elmore, 2 Camp. 407.

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[(D) Of Instruments not within the Stamp Acts, &c.]

A cognovit, being a mere confession of an action without any mutuality, does not require a stamp. But, if it contains any agreement for stay of execution, or any other terms, then a stamp is necessary.

Ames v. Hill, 2 Bos. & P. 150; *Reardon v. Swaby*, 4 East, 188.

A being entitled during his life to the dividends of certain bank annuities, and B being entitled to the stock at the death of A, it was agreed between them, that, in consideration of A's permitting B to sell out the stock, the latter should pay to A, during his life, an annuity equivalent to five per cent. on the principal money produced by the sale of the stock; and that, as security for payment of the annuity, A should assign to B a policy of insurance on goods on a voyage to India. By deed, reciting these facts, and that the stock had been sold out, and produced a given sum, which had been paid to B, the latter bargained, sold, and assigned to A the policy, and covenanted that, in case no money should be produced by the policy, he should, within one month after his return from the voyage he was about to make to India, pay to A a sum of money which, when invested in stock, would produce an annuity equal in amount to five per cent. on the principal money produced by the sale of the stock. Held, that the deed did not require an *ad valorem* stamp, the transaction described in it not being a "sale" of an annuity within 55 G. 3, c. 184, sched. p. 1, and the assignment of the policy not being a conveyance of "property" within the meaning of that word in the statute.

Blandy v. Herbert, 9 Barn. & C. 396.

The following particulars are expressly exempted from the stamp duty imposed on agreements:—

1. Any label containing the heads of insurance to be made by the *Royal Exchange Insurance* and *London Insurance Companies*.

2. Memorandum or agreement for granting any lease or tack at rack-rent of any land under the yearly rent of 5*l*.

St. 48 G. 3, c. 149; 55 G. 3, c. 184. See also 23 G. 3, c. 58, § 3; 35 G. 3, c. 30, § 1, 6; 37 G. 3, c. 90, § 1, 6.

Whether a particular agreement is to be considered as a lease, (in which case it will require a lease stamp,) or merely as an agreement for a lease, depends on the intention of the parties, to be collected from the whole of the instrument.

Morgan v. Bissel, 3 Taunt. 65.

If the words are, that the one party *does* demise, &c., or that the other party *shall have*, &c., and no other words appear to qualify the expressions, they import an actual lease. And where an intention appears on the instrument to convey a present interest, or where there are words of present demise, without any thing to show that the parties intended a mere executory contract, the instrument will be construed as an actual lease, notwithstanding there may be a stipulation for executing a subsequent lease under seal.

Harrington v. Wise, Cro. Eliz. 486; *Tisdale v. Essex*, Hob. 54; *Baxter v. Brown*, 2 Blackst. 973; *Barry v. Nugent*, 5 Term R. 165; *Pool v. Bentley*, 12 East, 168; *Tempest v. Rawling*, 13 East, 18; *Doe v. Groves*, 15 East, 244; *Phill. on Evid.* 508, (6th ed.); and see *antè*, tit. *Lease*, (K).||

A written agreement in these words, "A doth let and sell to B, for the term of three years," &c., was offered in evidence in an action of *assumpsit* on a special agreement. The defendant objected to its being read, because

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it was a lease, and was not stamped. For the plaintiff it was said, this was only a memorandum of a parol lease, which, being for three years only, is good as such, and that the statute, in using the words, "indenture, lease, or deed-poll," meant only deeds. But it was holden, that though a parol lease for three years is good, yet if a man, through caution, will reduce it into writing, he must pay for the stamp; otherwise the court are inhibited from receiving it in evidence.

Prosser v. Phillips, Hereford Summer Assizes, 1765, *coram* Perrot, B., Bull. Ni. Pri. 269; *Hearne, v. James*, 2 Br. Ch. Rep. 309, S. P.

¶3. Memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant.(a)

(a) The 7 & 8 G. 4, § 56, § 17, exempts agreements between masters and mariners for wages or service on any voyage, from more than a duty of 2s.

An agreement for the assignment of an apprentice from one master to another is not within this exemption, the term "*hiring*" not being applicable to an apprentice.

Rex v. St. Paul's Bedford, 6 T. R. 452.

4. Memorandum, letter, or agreement, made for, or relating to, the sale of any goods, wares, or merchandise.¶

The plaintiff, through the medium of the defendant, his broker, had made two purchases of cotton; and the defendant engaged to indemnify the plaintiff from any loss on the re-sale of them. At the trial, the plaintiff gave parol evidence of this contract of indemnity, and for further proof, called upon the defendant to produce his book, wherein he had entered a minute of the contract for the purchase of the cotton, with the letter G at the bottom, which was explained to signify *guarantee*. It was objected, that this entry ought to have been stamped by virtue of the 23 G. 3, c. 58, which requires a stamp on every piece of paper whereon any agreement shall be written, whether the same be only evidence of the contract, or obligatory upon the parties from its being a written instrument. But the court held, that the entry required no stamp; for that it came within the exception in the fourth section of that act, whereby it is provided, that it shall not extend to any memorandum, letter, or agreement, made for *or relating to the sale of goods*; under which latter description this contract fell.

Curry v. Edensor, 3 T. R. 524.

¶Upon this clause it has been determined, that an agreement by the defendant to take a share of some goods bought by the plaintiff, on their joint account, and to pay for them at a certain time, is an agreement *relating* to the sale of goods, and therefore exempted from stamp duty. So, also, we have seen, is an agreement by a broker to indemnify his principal, for whom he bought goods, from any loss on the re-sale, or a guarantee for the payment of goods purchased by a third person.

Venning v. Leckie, 13 East, 7; *Curry v. Edensor*, 3 T. R. 524; *Warrington v. Furber*, 8 East, 242; and see 2 Stark. Ca. 368, 431.

And where the primary object of an agreement is the sale of goods, the introduction of other matter connected with the sale does not render a stamp necessary. An agreement, therefore, for the sale of a ship, and for procuring her to be chartered, need not be stamped.

Tooke v. Meering, 1 Danson and Lloyd's R. 35.

A letter from a principal to his factor, containing bills of exchange drawn

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upon the factor, and engaging to provide for the bills if certain goods in his hands remained unsold when the bill should become due, is not within the last exemption from stamp ; for the clause is confined to instruments which have the sale of goods for their *primary* object, and the primary object of the letter in question was the obtaining money on a pledge of goods.

Smith v. Cator, 2 Barn. & A. 778.

An agreement for making certain machinery, at a fixed price, has been considered, in one case, not within the exemption, on the ground that it is not a contract *relating to the sale*, but to the *making*, of goods, and to work and labour to be done.

Buxton v. Bedall, 3 East, 303 ; *sed* see observations on this case, Phill. on Evid. 510, (6th edit.)

However, the Court of Common Pleas have determined that a contract for sale of linseed oil, to be made out of seed then in the vendor's possession, is within the exemption, as being a contract relating to the sale of goods.

Wilkes v. Atkinson, 6 Taunt. 11 ; and see 5 Barn. & A. 613.

An agreement for the sale of crops growing on certain lands, has been determined to be an agreement for an interest in land, and not exempted as a sale of goods.

Waddington v. Bristow, 2 Bos. and P. 453 ; Crosby v. Wadsworth, 6 East, 602 ; Emmerson v. Heelis, 2 Taunt. 38.

But where the owner of a close cropped with potatoes agreed to sell them at a certain rate, and the purchaser was to take them up *immediately*, the Court of King's Bench held, that this was not an agreement for any interest in the land, for the land was to be considered a mere warehouse for the potatoes till removal, which was to be done immediately.

Parker v. Staniland, 11 East, 362 ; and see Warwick v. Bruce, 2 Maule and S. 205 ; Evans v. Roberts, 5 Barn. and C. 629.

A contract under *seal* relating to the sale of goods is not exempt from the stamp duty on deeds.

Clayton v. Burtenshaw, 5 Barn. & C. 41.

An agreement to supply a house with water by means of pipes to be laid in a certain manner, and to a certain extent, is an agreement for sale of goods not requiring stamp.

West Middlesex Waterworks v. Suwercropp, Moo. & Malk. 409.

An agreement to confess judgment for 30*l.* to secure 5*l.* and costs, is not an agreement for more than 20*l.*, within the 23 Geo. 3, c. 58, s. 4, and therefore need not be stamped.

2 Bos. & P. 150.

A valuation made of parish lands by two resident parishioners appointed for that purpose, at a parish meeting, by the parish officers, with a view of equalizing the poor's rate, does not require an appraisement stamp ; it being merely for the information of the parties employing the valuers, and the valuers not bearing the known character of appraisers.

Atkinson v. Fell, 5 Maul. & S. 240.

An appointment of an umpire, made in writing, by two arbitrators, requires no stamp.

Routledge v. Thornton, 4 Taunt. 704.

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Where the mere value of goods, or any other matter, is referred to an arbitrator, a paper signed by him, ascertaining the amount, does not require an award stamp, but only an appraisement stamp; but it is otherwise, if he is to determine whether or not any thing is due.

Leeds v. Burrows, 12 East, 1; Jebb v. M'Kiernan, Moo. & Malk. Ca. 340.

An unstamped draught, drawn on A B, bricklayer, is not within the exception of 23 Geo. 3, c. 49, § 4, in favour of drafts drawn on bankers, within ten miles of the place where the draft is drawn.

Castleman v. Ray, 2 Bos. & P. 383.

A draft on a banker, post-dated, and *delivered* before the day of the date, though not intended to be used till that day, requires to be stamped by the 31 Geo. 3, c. 25, not being within the exemption of the fourth section, which exempts drafts payable to bearer on demand, bearing date on or before the day on which the same *shall be issued*.

Allen v. Keeves, 1 East, 435.

The shipping note of goods shipped from a port of Scotland to London, is not a bill of lading of goods to be exported, so as to require a stamp under 48 Geo. 3, c. 149; since such goods must be considered as carried *coastwise*.

Scotland v. Wilson, 5 Taunt. 533.

The weekly notes for payment of 3s. 6d., under the Lords' Act, do not require stamp.

Tekell v. Casey, 7 Term R. 670; Bowring v. Edgar, 1 Bos. & P. 270.

Where an account contains acknowledgments of sums received at successive times, written at the time of the receipt, it must be stamped with a receipt stamp.

Wright v. Shawcross, 2 Barn. & A. 501.

5. Memorandum or agreement made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in Great Britain.

6. Letters containing any agreement (*a*) (not before exempted) in respect of any merchandise, or evidence of such an agreement, which shall pass by the post between merchants and other persons carrying on trade or commerce in Great Britain, and residing and actually being, at the time of sending such letters, at the distance of fifty miles from each other.

(*a*) See Chitty on Stamps, pp. 77, 78.]

In an action on the defendant's undertaking to pay the debt of his mother, who was in trade, it appeared, that the debt arose in the course of her business, which the defendant assisted her in carrying on, though without any share in it. The evidence of the undertaking was a letter written by the defendant to the plaintiff. The question was, Whether the letter ought to have been stamped, as all agreements in writing are required to be by the above act of 23 Geo. 3, c. 58; or, whether the letter came within the exception of 32 Geo. 3, c. 51, § 1, whereby it is provided, "That the said act shall not extend to make liable to the stamp duty any letter passing by the post between merchants or other persons carrying on trade or commerce in this kingdom, residing at fifty miles distance from each other." The court held, that, as it appeared that the defendant did carry on the business for his mother, and this debt arose in the regular course of trade, any letter written by him on account of that very trade, whereby he bound himself to

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another tradesman, might fairly be construed to fall within the letter and spirit of the last act, which meant that the correspondence of merchants and tradesmen at a distance from one another, on the faith of which they had considerable dealings, should not be fettered with stamps.

Mackenzie v. Barks, 5 T. R. 176.

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WHERE the legislature have appropriated a stamp to any particular form of instrument, a substitution of another stamp, though of equal value, will not give validity to such instrument; for as long as a distinction of the several stamps is preserved by the legislature, it must be adhered to by the courts of justice. Hence articles of agreement, under seal, stamped with an agreement stamp, were holden to be inadmissible in evidence, though the agreement stamp which they bore was of the same value with the stamp which they required, viz., a deed stamp.

Robinson v. Drybrough, 6 Term R. 317. {See 1 East, 55, *Farr v. Price*; 2 East, 414, *Taylor v. Hague*; 5 East, 309, *The King v. Inh. of Keynsham*; 4 Bos. & Pul. 30, *Chamberlain v. Porter*; 1 Esp. Rep. 243, *Robinson v. Drybrough*; *Ibid.* 292, *Aitchison v. Sharland*.} ||Vide 37 G. 3, c. 136, § 1; 48 G. 3, c. 149; *Phill. on Evidence*, 1, 489, (6th ed.)||

{The plaintiff cannot recover upon a promissory note made in Jamaica and payable in London, which by the laws of Jamaica was void for want of a stamp. But if there is also a general count in the declaration, he will not be concluded from recovering on it by the fact of the defendant's having given {¹} this imperfect promissory note for the demand.

{7 Term, 241, *Alves v. Hodgson*; 2 Esp. Rep. 528, S. C. {¹} 1 East, 58; 1 Esp. Rep. 245, *acc.* But in *Ludlow v. Van Rensselaer*, 1 Johns. Rep. 94, the Supreme Court of New York decided that a note made in France, but payable to a person in America, is valid here, though not stamped according to the laws of France. For our courts do not take notice of the revenue laws of foreign countries. And see the opinion of Lord Mansfield in *Holman v. Johnson*, Cowp. 343, *acc.*

If letters containing an agreement are set forth in a bill in Chancery, and admitted by the answer, they need not be produced stamped; the answer, admitting them, dispenses with the necessity of evidence. So if an action at law be brought on an agreement which ought to be stamped, and the form of pleading be such that at the trial it is not necessary to produce the instrument, as if it is admitted on the record, and the trial is upon issues collateral to the existence of the agreement; it has never been considered as open to the court to examine whether the instrument was legally available with reference to the stamp laws.

11 Ves. J., 583, 596, *Huddleston v. Briscoe*.

There need not be any stamp on a promissory note for the weekly payments to a debtor under the Lords' Act; because the duty is imposed on notes only where the sum expressed therein or made payable thereby shall amount to 40s., and the sum expressed in those notes is only 3s. 6d.; and the sum owing under them could never amount to 40s., as, if the allowance was not paid weekly, the defendant might be discharged.

7 Term, 670, *Tekell v. Casey*; 1 Bos. & Pul. 270, *Bowring v. Edgar*. *Contra*, 7 Term, 530, *Pitman v. Haynes*.

Where the plaintiff entered an account in writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing of the receipt of the contents; though such acknowledgment in writing cannot be itself given

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in evidence, in respect to the cash items amounting to above 40s. in each page, for want of a receipt stamp, yet it is competent to the plaintiff to prove that, upon calling over each article to the defendant, he admitted that he had received the same; and the witness may refresh his memory by referring to the account.

1 East, 460, *Jacob v. Lindsay*.

See several decisions on the construction of the act of Congress of the United States, passed 6 July, 1797, in 1 Johns. Ca. 106, *Davis v. Ostrander*; Ibid. 134, *Burns v. Baker*; 2 Johns. Rep. 423, *Edeck v. Ranuer*.)

||An instrument containing a present demise of a house, containing also an agreement for goods and fixtures in the house, requires a lease stamp, the one contract being auxiliary to the other; and, unless it is so stamped, cannot be given in evidence as an agreement for sale of goods in an action to recover the amount.

Corder v. Drakeford, 3 Taunt. 382.

The stat. 37 Geo. 3, c. 136, contemplates the mistakes which may arise in the use of stamps, and makes provision for those mistakes. It enacts, that where any instrument (except bills, notes, and drafts) shall have been stamped with a stamp of different denomination, but of equal or greater value than that required by law, the commissioners, upon payment of the duty and a penalty of 5*l.*, may stamp the same with a proper stamp. With respect to bills and notes, (which, by stat. 31 Geo. 3, c. 25, were forbidden to be stamped after they were made,) the statute of 37 Geo. 3, c. 136, § 5, (incorporated with 48 Geo. 3, c. 149, by §§ 3 and 8 of that act,) provides that bills and notes made subsequent to that act, and stamped with an improper stamp, but of equal or greater value than the stamp required, may be stamped by the commissioners on payment of the duty and a penalty. But bills and notes made before that act remain in the same situation as if the act had not passed.

Phill. on Evid. 1, 507, (7th ed.)

Provided a bill or note bear a stamp of the proper denomination, it is now, by the operation of the 43 Geo. 3, c. 127, § 6, no ground of objection to it, that it is of greater value than that required by law. Nor is it an objection, (since 55 Geo. 3, c. 184, § 10,) though it have a stamp of a different denomination, unless such stamp is specially appropriated to some other instrument by having its name on the face thereof.

Bayley on Bills, p. 80, (4th edit.) Vide *Farr v. Price*, 1 East, 55; *Taylor v. Hague*, 2 East, 414, where stamps were objected to on the ground now removed by 43 G. 3, c. 127, § 6.

A schedule of goods referred to in a deed to which it is annexed, must have the proper deed stamp required by 37 Geo. 3, c. 90, § 7, according to the number of words and sheets, and not merely the schedule stamp imposed by § 1.

Lake v. Ashwell, 3 East, 326.

A warrant of attorney to confess judgment was liable, as a deed, to a stamp duty of 10s. by various statutes prior to the 37 Geo. 3, c. 111, which imposes an additional duty of 10s. on all deeds, with an exception of bonds and letters of attorney. A warrant of attorney was held within such exception, and therefore liable only to a duty of 10s. as before that statute.

Barrow v. Mashiter, 4 East, 431.

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An award in writing, and under seal, need not have a deed stamp, unless delivered as *a deed*; being only delivered as *an award*, it is sufficient if it have an award stamp.

Brown v. Vawser, 4 East, 584.

Where nothing is referred to appraisers but the mere value of goods, repairs, &c., an appraisement stamp on the written valuation is sufficient, under 46 Geo. 3, c. 43, and an award stamp is not necessary; but it is otherwise if the appraiser is to decide whether or not any thing is due.

Leeds v. Burrows, 12 East, 1.

By the 55 Geo. 3, c. 184, sched. part I., all bills, drafts, or orders for payment of any sum of money, out of any particular fund which may or may not be available, or upon any condition or contingency, which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, or if the same shall be delivered to the payee, or to some person on his or her behalf, shall be deemed inland bills, drafts or orders, within the meaning of the schedule of the act.

A letter from the owner of goods to his agent having the possession of them, directing him to pay a sum certain, out of the proceeds of the sale of the goods, to a third party, is an order for the payment of money within this clause.

Firbank v. Bell, 1 Barn. & A. 36; and vide 2 Bro. & B. 78.

An instrument (*e. g.* a commission of bankrupt) issuing under the great seal of the empire does not come within the description of a process or mandate under the seal of one of the courts at Westminster, so as to require the stamp required by several acts for such instruments.

Rex v. Bullock, 1 Taunt. 71.

Reserving interest from the date of a bill or note will not vary the stamp, which is to be calculated on the principal due at the time the bill or note is given.

Pruessing v. Ing, 4 Barn. & A. 204.

A note payable two months after sight requires a stamp appropriated to a note payable *more* than sixty days after sight, or two months after date, sight and date not being here synonymous.

Sturdy v. Henderson, 4 Barn. & A. 592.

A promissory note for 11*l.*, payable to A B on demand, has been held to be a promissory note payable to bearer on demand, within the first class of the schedule as to notes, in 53 Geo. 3, c. 184, and requires the higher rate of stamp, (2*s.*)

Keates v. Whieldon, 8 Barn. & C. 7.

But a promissory note payable “to A B *or order* on demand,” is held to fall within the second class of the schedule, being a note payable in another manner than to bearer on demand, and not exceeding two months after date.

Moyser v. Whitaker, 9 Barn. & C. 409.

And so also as to a note payable “to A B or order;” and the authority of Keates v. Whieldon seems to be doubtful.

Armitage v. Berry, 5 Bing. R. 301.

An order by A to defendant to pay to plaintiff a sum of money out of

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the produce of sale of goods of A in defendant's possession, and about to be sold by him, requires an inland bill stamp.

Emly v. Collins, 6 Maul. & S. 144.||

||(F) Of the Consequences of an Instrument not being duly stamped.||

||In general the stamp acts do not render deeds, &c., *void*, which are not properly stamped, but merely subject the parties to penalties to enforce the duty, and prohibit the instrument from being read in evidence until the same has been duly stamped.

1 Stra. 624; 6 Mod. 364; 5 & 6 W. 3, c. 21.||

By an act for more effectually securing the stamp duties on indentures, leases, bonds, and other deeds, a penalty of 20*l.* is imposed upon any attorney, solicitor, clerk, officer, or other person, who shall engross, print, or write any indenture, lease, bond, or other deed, on vellum, parchment, or paper, not duly stamped according to the directions of that act, and who shall neglect to bring the same to be duly stamped within the time thereby directed and allowed; and no such indenture, lease, bond, or other deed, shall be pleaded or given in evidence, or be good, useful, or available in any manner whatever, unless the same shall be stamped as required by that act.

37 G. 3, c. 19, § 3. ||By the 55 G. 3, c. 184, § 8, this provision applies to the stamp duties under that act.||

||The 23 Geo. 3, c. 58, § 12, relating to agreements, &c., declares, that unless the instrument be duly stamped, it shall not be pleaded, or given in evidence in any court, or admitted to be good, useful, or available in law or equity.

The 31 Geo. 3, c. 25, § 19, and 35 Geo. 3, c. 55, § 10, relating to bills, notes, and receipts, contain a similar regulation.

See *Green v. Davies*, 4 Barn. & C. 242.

By 8 Ann. c. 9, § 39, all indentures of apprenticeship not stamped within the respective times for that purpose limited by the act, or in which the premium is not duly inserted, are declared *void*, and not available in any court or place, or for any purpose whatsoever.

See 5 Barn. & A. 415.

The general rule as to the consequence of a want of proper stamp is, that the unstamped or unduly stamped instrument cannot be read in evidence for the purpose of giving to it any legal operation; (a) and no parol evidence can be given of its contents. Thus, in an action for use and occupation, if it appear that defendant held under a written agreement, which for want of stamp cannot be given in evidence, the plaintiff will not be allowed to go into general evidence; for the agreement is the best evidence of the nature of the occupation. (b) And it makes no difference that the instrument is *functus officio* at the time it is offered in evidence. Thus, an agreement to assign an apprentice cannot be received in evidence without stamp, even after the expiration of the apprenticeship. (c)

(a) *Rex v. St. Paul's Bedford*, 6 Term R. 452; *Hodges v. Drakeford*, 1 New R. 271; *Rex v. Castle Morton*, 3 Barn. & A. 588. (b) *Brewer v. Palmer*, 3 Esp. Ca. 213; *Doe v. Hore*, 2 Esp. Ca. 724; *Ramsbottom v. Mortley*, 2 Maul. & S. 445. (c) *Rex v. Inhabitants of St. Paul's Bedford*, 6 Term R. 452.

A note given as an apprentice fee cannot be enforced, the indentures

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being void for want of stamp, although the master has, in fact, maintained the apprentice for a time.

Jackson v. Warwick, 7 Term R. 121; and see 3 Esp. 188.

The giving a bill or note without stamp, or with an improper stamp, will not preclude the creditor from proving his original debt.^(a) Such a bill is no payment, although the parties would have paid it if presented in due time.^(b)

^(a) *Brown v. Watts*, 1 Taunt. 353. ^(b) *Wilson v. Vysar*, 4 Taunt. 288.

The rule as to the necessity of stamp is the same although the instrument be in the possession of the opposite party. In such case it is not sufficient to produce a *copy* duly stamped.

Williams v. Stoughton, 2 Stark. Ca. 292.

And parol evidence is inadmissible though the unstamped instrument is lost;^(c) or even though it be destroyed by the party who objects to the want of stamp.^(d) It is one of the risks attendant on an omission to stamp an instrument before it is executed, that, if any accident happens to it before the stamp is affixed, there is no remedy on it whatsoever.

^(c) *Rex v. Castle Morton*, 3 Barn. & A. 588. ^(d) *Rippiner v. Wright*, 2 Barn. & A. 478.

However, where a party refuses, after notice, to produce an agreement in his possession, it will be presumed to be duly stamped till the contrary appear. If, however, the contrary is proved, secondary evidence of the agreement cannot be received.^(e) And if the agreement is produced by the opposite party on notice, it cannot be read unless duly stamped.^(g)

^(e) *Crisp v. Anderson*, 1 Stark. Ca. 35. ^(g) *Doe v. Hore*, 2 Esp. Ca. 724.

But though an unstamped instrument is not admissible in evidence for the purpose of being an available instrument, or having a legal operation in itself, it may be received for certain purposes collateral to its efficacy as an instrument.

Thus, on an indictment for forging an instrument, or uttering it knowing it to be forged, it is settled that the forged instrument, though unstamped, is evidence against the prisoner:^(h) for the stamp acts cannot affect the law as to forgery, and the offence is complete whether the instrument be stamped or not. And if a person were to be sued for a penalty in having negotiated an instrument without stamp, there can be no doubt but that the unstamped instrument might be given in evidence, notwithstanding the general prohibitory words of the stamp acts.⁽ⁱ⁾

^(h) *Rex v. Hawkeswood*, 1 Leach, C. C. 295; *East's P. C.* 955; *Rex v. Reculist*, 2 Leach, C. C. 811; *Rex v. Davies*, 2 East, P. C. 956; *Phill. on Evid.* 500, (6th ed.) ⁽ⁱ⁾ 2 Leach, Cr. Ca. 813.

So, an unstamped check is admissible on an indictment for larceny, for the purpose of identifying the property charged to be stolen.

Rex v. Pooley, 3 Bos. & Pul. 316.

So, in a civil action, an unstamped agreement is admissible for the collateral purpose of proving usury.

Stark. on Evid. 1382.

So, in an action to recover penalties for illegally insuring lottery-tickets, contrary to 22 Geo. 3, c. 47, § 13, Lord Kenyon held, that an instrument purporting to be a policy of insurance might be given in evidence without stamp. (Here it is to be observed, that the instrument, being prohibited and illegal, could not be within the acts requiring stamp.)

Holland q. t. v. Duffin, *Peake's Ca.* 57.

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So, in an action of debt for bribery at an election, Lord Ellenborough held, that an unstamped promissory note, which a witness swore he had given for repayment of money received by him from the defendant, (a candidate,) for his vote, was evidence in corroboration of the witness, to show the fact of payment. It was not offered as a security, or to enforce it as a valid instrument, but as corroborating the evidence of the witness as to the transaction.

Dover v. Maestair, 5 Esp. Ca. 94.

And so in an action for money lent, where the defence was, that the defendant had been made drunk by the plaintiff, and induced to write an unstamped note for 40*l.*, without receiving any money, the same learned judge held, that this note (though not evidence to prove the loan of money) might be looked at by the jury to prove or disprove the fraud imputed to plaintiff.

Gregory v. Fraser, 3 Camp. 454.

But in a late civil action it has been held by the Court of King's Bench, that the jury cannot be allowed to look at and draw a conclusion of fact from an unstamped instrument.

Sweeting v. Halse, 9 Barn. & C. 365.

And even in a criminal case, in general, an unstamped instrument cannot be read in evidence as an instrument of that description, which it would answer if stamped. Thus, on an indictment for setting fire to a house, with intent to defraud an insurer, an unstamped policy is not admissible, to prove the contract of insurance.

Rex v. Gilson, 1 Taunt. 95.

And upon an indictment against a clerk for embezzling his master's money, a receipt given by the clerk to the debtor of the master who paid him the money, is not evidence against the prisoner, if unstamped.

Rex v. Hall, 3 Stark. Ca. 67. In this case it is to be observed, the instrument was offered in evidence for the very purpose for which, by the stamp laws, it is made unavailable, viz., to prove the receipt and payment of money; but these two last cases seem irreconcilable with the reasons of the judges in *Reculist's* case, (2 Leach, 706,) for admitting unstamped instruments in criminal cases, viz., that the legislature, by the stamp acts, merely meant to prevent their being received in evidence, when proceeded upon to recover the value of the money thereby secured. It has been held, that trover lies for an unstamped agreement, though it seems that the plaintiff must show that it might be stamped at the stamp-office, on payment of penalty. *Scott v. Jones*, 4 Taunt. 865; *sed vide Peake's* Ca. 167.

And an unstamped agreement for letting a tenement is not evidence in a settlement case to prove the value, for that is the essence of the contract.

Rex v. Castle Morton, 3 Barn. & A. 588.

An unstamped receipt may be referred to by a witness, to refresh his testimony, though it cannot be put in evidence.

Rambert v. Cohen, 4 Esp. Ca. 213; *Jacob v. Lindsey*, 1 East, 460.

And the rule excluding an unstamped instrument from being *evidence* to the jury, does not apply to the *court looking at* it for collateral purposes, and to see how far it affects the reception of other evidence. Thus, if an unstamped contract relate to the sale and delivery of goods, and a contract be proved by parol only, the court will look at the instrument to see if it applies to the goods then sought to be recovered for.

Per Bayley, J., 15 East, 455.

Statute.

So, justices at sessions may look at an unstamped agreement relating to an expired hiring and service, to see when it ceased to operate, in order to guide them as to receiving or rejecting parol evidence to prove a subsequent hiring and service.

Rex v. Pendleton, 15 East, 449.

So, where a party declared upon two written agreements, with some counts on both agreements, and some on the first only, and the first agreement only was stamped; it was held, that though the second agreement could not be received in evidence, the court might look at it to see whether it altered the first, and as it did so, the plaintiff could not recover on the counts setting out the first only.

Reed v. Deere, 7 Barn. & C. 261; and see *Vincent v. Cole*, 3 Carr. & P. N. P. Ca.

An unstamped agreement relating to the sale of goods (which is exempt from stamp duties) and also to some other matter, in respect of which it ought to have been stamped, may be read as to the former.

Heron v. Granger, 5 Esp. Ca. 269; and see 1 Stark. Ca. 437, S. P.

STATUTE.

[THE statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time. All our law began by consent of the legislature; and whether it is now law by usage or writing is the same thing. For many (*a*) of those things that we now take for common law were undoubtedly acts of parliament, though not now to be found on record.

Per Wilmot, C. J., 2 Wils. 348. (*a*) *Hale's Hist. of the Com. Law*, 68.

β Among the civilians the term statute is generally applied to all sorts of laws and regulations; every provision of law which ordains, permits or prohibits any thing is a statute; without considering from what source it arises. Sometimes the word is used in contradistinction to the imperial Roman law, which by way of eminence civilians call the common law. They divide statutes into three classes, personal, real, and mixed.

Personal statutes are those which have principally for their object the person, and treat of property only incidentally; such are those which regard birth, legitimacy, freedom, the right of instituting suits, majority as to age, incapacity to contract, to make a will, to plead in person, and the like. A personal statute is universal in its operation, and in force everywhere.

Real statutes are those which have principally for their object property, and which do not speak of persons, except in relation to property; such are those which concern the disposition which one may make of his property either alive or by testament. A real statute, unlike a personal one, is confined in its operation to the country of its origin.

Mixed statutes are those which concern at once both persons and property. But in this sense almost all statutes are mixed, there being scarcely

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any law relative to persons, which does not at the same time relate to things.

Bouv. L. D. *Statute*; Story, Conf. of Laws, § 12, *et seq.*; 17 Mart. R. 569, 589; Merl. Répert. mot *Statut*; Poth. Coutume d'Orléans, ch. 1.^g

Indeed our lawyers have made a distinction between statutes themselves; they have distinguished between statutes made before the time of legal memory, viz., 1 R. 1, and those made since. The former are considered as part of the common law, the *leges non scriptæ*; for notwithstanding copies of them may be found, their provisions obtain at this day, not as acts of parliament, but by immemorial usage and custom. The latter, or those since time of memory, are again distinguished; those from 1 R. 1 to E. 3, are called *antiqua statuta*; and all subsequent statutes are called *nova statuta*.

1 Reeve's Hist. Eng. Law, 215.]

A statute is a written law, made by the king and two houses of parliament.(a)

[(a) It would be more correct to say, "By the king, with the advice and consent of the two houses of parliament."]

[An act of parliament is a law agreed upon by the king or queen of England, having a regal authority, the lords spiritual and temporal, and the commons, lawfully assembled; which taketh strength and life by the assent royal; so that the rest of the consents may be accounted to be parcel of the substance, and the royal assent to be *forma interna et informans, quæ dat rei esse*.

Hatton on the Statutes, p. 2, &c.

No new laws can be made to bind the people of this land, but by the king, with the advice and consent of both houses of parliament, and by their united authority; neither the king alone, nor the king with the concurrence of any particular number or order of men, have this high power.

2 Atk. 654, *per* Lord Hardwicke.

The binding force of these acts of parliament ariseth from that prerogative which is in the king, as our sovereign liege lord; from that personal right which is inherent in the peers and lords of parliament, to bind themselves and their heirs and successors, in their honours and dignities; and from the delegated power vested in the commons as the representatives of the people. And therefore Lord Coke saith, 4 Inst. 1, these represent the whole commons of the realm, and are trusted for them. By reason of this representation every man is said to be party to, and the consent of every subject is included in an act of parliament:—And though it be undoubtedly true, that many amongst the commons have no votes, as persons having no freehold, freeholders in the ancient demesne, women, &c., yet that does not make it cease to be an actual representation of the people. Nobody ever imagined that in exercising a right of this kind every person could possibly join, but some rule of qualification must be laid down, and that hath been taken from the most worthy, and such as have the most valuable and fixed sort of property; which also, to avoid confusion, hath been restrained by later acts of parliament.

2 Atk. 654.

The manner of passing bills in parliament has been shown under the title COURT OF PARLIAMENT, Vol. ii.

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β It is proper here to add the law as to the manner of passing bills by the national legislature. The ordinary mode of passing laws is briefly this: one day's notice of a motion for leave to bring in a bill, in cases of a general nature, is required; every bill must have three readings before it is passed, and these readings must be on different days; and no bill can be committed and amended until it has been twice read. In the House of Representatives, bills, after being twice read, are committed to a committee of the whole house, when a chairman is appointed by the speaker to preside over the committee; the speaker leaves the chair, and takes a part in the debate as an ordinary member. When a bill has passed one house, it is transmitted to the other, and goes through a similar form, though in the Senate there is less formality, and bills are often committed to a select committee, chosen by ballot. If a bill be altered or amended in the house to which it is transmitted, it is then returned to the house in which it originated, and if the two houses cannot agree, they appoint a committee to confer on the subject. When a bill is engrossed, and has received the sanction of both houses, it is sent to the President for his approbation. If he approves of the bill, he signs it. If he does not, it is returned, with his objections, to the house in which it originated, and that house enters the objections at large on their Journal, and proceeds to re-consider it. If, after such re-consideration, two-thirds of the house agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise re-considered, and if approved by two-thirds of that house, it becomes a law. But in all such cases, the votes of both houses are determined by yeas and nays; and the names of the persons voting for and against the bill, are to be entered on the Journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return; in which case it shall not be a law. Art. 1, s. 7. *Bouv. L. D. Congress.*

The remainder of what falls under this title shall be considered in the following order:

(A) Of some Things necessary to the Validity of a Statute.

(B) Of some Things incidental to a Statute.

(C) From what Time a Statute begins to have Effect.

(D) How long a Statute continues in force.

(E) Of the vast power of a Statute.

(F) Of a public or private Statute.

(G) Of an affirmative or negative Statute.

(H) Whose Province it is to construe a Statute.

(I) Rules to be observed in the Construction of a statute.

1. *Words and Phrases, the Meaning of which in a Statute has been ascertained, are, when used in a subsequent Statute, to be understood in the same sense.*

2. *In the construction of one Part of a Statute every other Part ought to be taken into Consideration.*

3. *If divers Statutes relate to the same Thing, they ought to be all taken into Consideration in construing any one of them.*

4. *The common Law ought to be regarded in the Construction of a Statute.*

5. *The Intention of the Makers of a Statute ought to be regarded in the Construction of the Statute.*

6. *In what Cases a Statute ought to have an equitable Construction.*

7. *A Statute which concerns the public Good ought to be construed liberally.*

8. *A remedial Statute ought to be construed liberally.*

9. *A penal Statute ought to be construed strictly.*

10. *Some other Rules which ought to be observed in the Construction of a Statute.*

β 11. *Of conflicting Statutes.*

(K) How a Person guilty of Disobedience to a Statute may be punished.

(L) Of Pleading a Statute.

1. *A public Statute.*

(A) Of Things necessary to the Validity of a Statute.

2. *A private Statute.*
3. *Some general Rules for pleading a Statute.*
4. *Some Rules for pleading a Statute, which relate to particular Parts of the Pleadings.*
5. *Of Misrecital in pleading a Statute.*
6. *Of Surplusage in pleading a Statute.*

(A) Of some Things necessary to the validity of a Statute.

It has been said, that a parliament may be holden without summoning the lords spiritual thereto; but the better opinion is that they ought to be summoned; because they have, by the law and custom of parliament, as good a right to sit in the House of Lords as the lords temporal.

2 Inst. 585.

If the spiritual lords, after having been summoned, voluntarily absent themselves, the king, lords temporal, and commons may make a statute without them.

2 Inst. 585.

This is constantly the case, where a bill is brought into parliament for attainting a person. The lords spiritual are forbidden by the canon law to be present at the passing of such bill; yet, if the bill do pass, it is a valid statute.(a)

2 Inst. 585, 586. [(a) It is remarkable, that though the bishops always decline to vote on acts of attainder, yet most of those acts make express mention of the lords spiritual. Vide st. 16 Car. 1, c. 1, in Rushw. Tr. Strafford, 756, 57, and the act for attainting Sir John Fenwick, 8 W. 3, c. 4, in 5 St. Tr. 44, 4th edit.] [As to the question of the judicial power of the bishops as peers in capital cases, which Mr. Hargrave, Co. Lit. 134, note 1, singularly confounds with their unquestioned right to vote on bills of attainder, see 1 Burn. Hist. Ref. 460; Sullingfleet's Works. vol. iii. p. 820; Hallam's Midd. Ages, vol. iii. p. 9, note.]

If the spiritual lords, being present, refuse to give their assent to or protest against the passage of a bill, yet, if the bill do pass, it is a valid statute.

2 Inst. 585.

Two bills being read in parliament, one intituled, (b) *A confirmation of the statute of provisors, and the forfeiture of him that accepteth a benefice against that statute*; the other intituled, (c) *The penalty of him that bringeth a summons or sentence of excommunication against any person upon the statute of provisors, and of a prelate executing it*; both which tended to restrain the authority claimed by the pope of disposing of ecclesiastical benefices within this realm; the Archbishops of Canterbury and York, in the name of the whole clergy of their provinces, made a solemn protestation in open parliament, that they would in nowise assent to any law in restraint of the pope's authority. This protestation was, at their request, enrolled; yet both bills were passed by the king, lords temporal, and commons, and are among the printed statutes.

4 Inst. 516. (b) 11 R. 2, st. 2, c. 2. (c) 11 R. 2, st. 2, c. 2.

As all votes in parliament, whether in the affirmative or in the negative, ought to be absolute, if the bishops annex any condition to their votes, their votes are void, and the statute is good without their concurrence.

2 Inst. 585.

(A) Of Things necessary to the Validity of a Statute.

A bill was brought into parliament in the time of Henry the Sixth, *That no man should contract or marry himself to any queen of England without the special license and assent of the king, on pain of losing all his goods and lands.* The bishops and clergy assented thereto, *as far forth as the same swerveth not from the law of God and the church; and so as the same importeth no deadly sin.* This was holden to be no assent, and it was specially entered, that the statute was enacted by the king, lords temporal, and commons.

Rot. Parl. 6 H. 6, n. 27; 2 Inst. 587.

Notwithstanding it be specially entered in the parliament roll, that a statute was enacted by the king, lords temporal, and commons, it is not to be inferred that the prelates were not summoned to parliament; but it must be intended that they voluntarily absented themselves; or refused to give their assent to, or protested against, the passing of a bill; or gave such votes as were *contra legem et consuetudinem parliamenti*.

2 Inst. 585, 587.

||In passing a statute in the House of Lords, each peer has a right, by leave of the House, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the House, with the reasons of such dissent, usually styled his *protest*. The first instance of such a protest on the rolls of parliament is in 15 Edw. 3, when petitions were presented of an obnoxious kind, (amongst other things,) that the judges and ministers should be sworn to observe the Great Charter, and should be *appointed in parliament*. The king, unwilling to defer a supply which depended on the granting the petition, suffered them to pass into a statute, but with *an alteration*, viz.: that the officers should be appointed by the king, but should surrender their charges at the next parliament, and be responsible to any who had cause of complaint against them. The chancellor, treasurer, and judges, entered their protest that they had not assented to these statutes, and could not observe them, in case they should prove contrary to the laws and customs which they had sworn to maintain.

1 Black. Com. 167; Rot. Parl. p. 128, 131.

The breach of law by the king in *altering* the statute, gave rise to another, in *revoking*, by royal proclamations to the sheriffs, the said statutes, as having passed without the king's assent, but that the king "dissimuled in the premises by protestations of revocation," in order to avoid the parliament dissolving without despatching any thing. However, in 17 Edw. 3, the statutes 15 Edw. 3 were utterly repealed, and to lose the name of a statute, as contrary to the laws and prerogative.

See the Proclamation, 15 Edw. 3; Stat. at Large, Rymer, 5, p. 382; 4 Inst. 51; and see Hallam's Midd. Ages, iii. p. 76.||

Some ancient statutes are penned in the form of charters, ordinances, commands, or prohibitions from the king, without mentioning either lords or commons, and some others have only the general words, *It is provided*, or *it is ordained*, without saying by whom; but as these have constantly been received as statutes, the presumption is, that they were made by lawful authority.

Hawk. Pref. to the Stat.; 1 Inst. 98. [Vide Reeves's Hist. Engl. Law, vol. i. 215; vol. ii. 354; vol. iii. 143, 252, 379. The mode of stating the enacting authority hath varied exceedingly at different periods; but the present correct style hath uniformly obtained from the 13 Car. 2.—In the famous act of Tonnage and Poundage, 12 Car. 2,

(A) Of Things necessary to the Validity of a Statute.

c. 4, it is remarkable that the enactment is not stated to be by the royal authority. The language of the act is, *by the commons, by and with the advice and consent of the lords in this present parliament assembled*. Perhaps, as the statute was to convey an interest to the crown, the framers of it might think the royal assent was sufficiently implied.]

The difference, according to Lord Coke, between a statute and an ordinance is, that the latter has not had the assent of the king, lords, and commons, but is made by only one or two of those powers.

4 Inst. 25.

Mr. Prynne, in his remarks upon this passage, says, there is no such difference, nor any difference between a statute and an ordinance. To prove this, he produces more than a hundred printed statutes, in which the words *act* and *ordinance* are used indifferently or coupled together as synonymous terms. He likewise cites a clause, contained in all writs for electing knights, citizens, and burgesses to parliament, which runs thus, *ad faciendum et consentiendum hiis quæ de communi concilio regni nostri contingerint ordinari*; and infers, that some acts of parliament have been called ordinances from the word *ordinari* in this clause.

Prynne's Animadv. on 4 Inst. 13; Prynne's Irenarch. Rediviv. 27 to 74. [See farther on this subject, Hargr. and Butl. Co. Litt. 159 b, *notis*; Whitlocke on the writ of Parliament, vol. ii, 294; Elsyng on Parliaments, 28; and Barrington's Observations on the more Ancient Statutes, p. 46.—With regard to the PARLIAMENTARY FORMS of enacting laws, thus much seems to be agreed; that where the proceeding consisted only of a petition from parliament, and an answer from the king, these were entered on the PARLIAMENT ROLL; and if the matter was of a public nature, the whole was then usually styled an ORDINANCE; if, however, the petition and answer were not only of a public, but a novel nature, they were then formed into an ACT by the king, with the aid of his council and judges, and entered on the STATUTE ROLL. Many instances of these distinctions are to be found upon the rolls of parliament. See 22 E. 3, n. 20, 30, vol. ii, p. 203, Rot. Parl.; 28 E. 3, n. 16, vol. ii, p. 257; 37 E. 3, n. 39, vol. ii, p. 280; and 1 R. 2, n. 56, vol. iii, p. 17; Hargr. and Butl. Co. Litt. *ubi supr.*; and 3 Reeves's Hist. Engl. Law, 146. An ordinance on the parliament-roll, with the king's assent upon it, has, nevertheless, equal force with a statute; and a *respectuatur* entered upon the roll in no degree lessens its authority. See st. 11 H. 4, n. 28, cited and admitted in evidence on Lord Macclesfield's trial, St. Tr. vol. vi.—See the Report from the committee upon temporary laws, expired or expiring.] ||Hallam's Midd. Ages, vol. iii. p. 72; Ruffhead's Pref. to the Statutes.|| §The term ordinance is more usually applied to the acts of a corporation, than to the acts of the legislature. Some acts of Congress, however, bear this name; as the ordinance of 1787, which regulates or serves as a constitution to the territories of the United States.¶

||The king, by his *proclamation*, cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment. Also the law of England is divided into three parts—common law, statute law, and custom; but the king's proclamation is none of them: and all indictments conclude *contra legem et consuetudinem Angliæ*, or *contra leges et statuta*, &c. But never was seen any indictment to conclude *contra regiam proclamationem*.

Case of Proclamations, 12 Co. Rep. 76; Fortescue de Laudibus, &c. cap. 9, Amos's edit., and the editor's note, pp. 59, 60, where see the remarks and references as to the assumption of legislative power by one branch of the legislature, whether the Commons or Lords.||

If a statute be against common right or reason, or {¹} repugnant, or impossible to be performed, the common law shall control it, and adjudge it to be void.

8 Rep. 118. {¹}4 Cran. 167, United States v. Cantril; } Bonham's case, 2 Inst. 527; Finch, 74; §Ham v. M'Claws, 1 Bay, 98; but see 3 Dall. 398; 2 Rawle, 374; 1 Baldw.

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74;g [" Acts of parliament that are impossible to be performed, are of no validity: and if there arise out of them, collaterally, any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament, contrary to reason, are void. But, if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule, do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable, there, the judges are in decency to conclude, that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus, if an act of parliament gives a man power to try all causes that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. But, if we could conceive it possible for the parliament to enact, that he should try, as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words as leave no doubt whether it was the intent of the legislature or no." 1 Bl. Comm. 91.] {See 1 Wils. Works, 455-460; 3 Dall. 387, 388.}

It has been holden, that a statute contrary to natural equity, *as to make a man judge in his own cause*, is void; for that *jura naturæ sunt immutabilia*.

Hob. 87; 8 Rep. 118; {12 Mod. 687, 688.}

But it is said in another case wherein this case is cited, that the judges will not hold a statute to be void, unless it be clearly contrary to natural equity; for that they will strain hard rather than hold a statute to be void.

10 Mod. 115; 11 Co. 63.

{In the United States, a statute repugnant to the constitution is void; and the courts have power and are bound to declare it void.

1 Wils. Works, 460; 2 Dall. 307, *Vanhorne's Lessee v. Dorrance*; Ibid. 410, n.; 3 Dall. 171, *Hylton v. United States*; 4 Dall. 18, 20, *Cooper v. Telfair*; 1 Cran. 137, *Marbury v. Madison*; 2 Cran. 384, 396, *United States v. Fisher*; 1 Bin. 416, *Emerick v. Harris*.

And a statute of any state contrary to a treaty of the United States is inoperative.

1 Johns. Rep. 280, 281, *Jackson v. Munson*; 4 Cran. 417, *Higginson v. Mein*; 3 Dall. 199, *Ware v. Hylton*; 4 Johns. Rep. 75, *Jackson v. Wright*.}

Before the art of printing was introduced into England, all statutes were at the end of every session of parliament transcribed on parchment, and sent to the sheriff of every county, and with them a writ from the king, commanding him to proclaim them throughout his bailiwick.(a) After he had proclaimed them, which was usually done in the county court, the transcripts were there deposited, that any person might read or take copies of them.

2 Inst. 526, 644; 4 Inst. 26. [(a) This mode of promulgating the statutes seems to have fallen into disuse very soon after the introduction of the art of printing. The last proclamation writ to be found upon the statute rolls in the Tower, bears date 8 Rich. 2, viz., in the year 1385.—See Report from the committee for promulgation of the statutes, p. 5, 6.] ß Various provisions have been made by Congress for the publication and promulgation of the laws of the United States, which are here briefly noted: The act of the 3d of March, 1795, provides for the printing of the public laws of the United States, and their distribution among the states and territories in the proportion

(B) Of some Things incidental to a Statute.

to their representation. The act of March 2, 1799, directs that the secretary of state shall, as soon as conveniently may be after he shall receive any order, resolution, or law passed by Congress, cause the same to be published in not less than one nor more than three newspapers in each state. The act of November 21, 1814, authorizes the secretary of state to make similar publications in two of the public newspapers within each and every territory of the United States. The act of April 20, 1818, provides that the publication shall be made in not more than one newspaper in the District of Columbia, and in three newspapers in each state and territory. §

But a statute was even at the time when this laudable practice prevailed equally binding, although it had not been so proclaimed. (a)

4 Inst. 26; 2 Inst. 526. [(a) Ordinances were never promulgated in this manner; but it was sometimes recommended by the king to the Commons (probably by a *charter* or *patent*) to publish them in their counties. 3 Reeves's Hist. Eng. Law, p. 147.]

It has been holden, that the title of a statute is no part of the statute; because this is usually framed by the clerk of that house in which the bill first passes; and is seldom read more than once. (b)

3 Rep. 33; Poulter's case, Hard. 324; Lord Raym. 77. [(b) But the title is sometimes material in the construction of the statute. See 7 East, 132, 134.] [And as arguments are frequently drawn from the title of a statute, it is to be wished that there was a little more attention to the settling of it. For example, who would expect to find a most material alteration of the statute of Distributions, in a law, the title of which is, *An act for the renewal and continuance of several acts of parliament?* 1 Jac. 2, c. 17, § 8. Or in an act, the title of which is, *An act to enforce the execution of an act of this session of parliament, for granting to His Majesty several rates and duties upon houses, windows, or lights*, to find a provision, that all existing, and all future statutes which mention England, shall also extend to Wales and Berwick-upon-Tweed, though not particularly named? 20 G. 2, c. 42, § 3. It becomes indeed impossible, when statutes relate to matters of a very miscellaneous nature, that the title can be co-extensive with the views of the legislature; it is therefore to be wished that such acts of parliament were distinct laws, and not thrown together in that very strange confusion which hath now obtained the name of a *hodge-podge* act. Barrington's Observations on the more Ancient Statutes, p. 449. See an instance of one of these acts in 17 G. 2, c. 40.]

The custom of prefixing titles to statutes did not begin till about the eleventh year of the reign of Henry the Seventh. (c)

Ld. Raym. 77; Chance v. Adams, Hard. 324. [(c) Instances have, however, occurred before this time. Barrington's Observations on the more Ancient Statutes, p. 449, *notis.*] β A practice has prevailed of late years to crowd into the same act a mass of heterogeneous matter, so that it is almost impossible to describe, or even to allude to it in the title of the act. The practice has rendered the title of little importance, yet, in some cases, it is material in the construction of an act. Bouv. L. D., title *Legislation*; 7 East, 132; Fisher v. Blight, 2 Cranch, 386. See Lord Raym. 77; Hard. 324. §

The preamble of a statute usually contains the motives and inducements to the making of it: but it has been holden that it is no part of the statute.

6 Mod. 62, Mills v. Wilkins; 8 Mod. 144. [As to its use in construing statutes, see *post.*] β See also Seidenbender v. Charles, 4 S. & R. 166. §

(B) Of some Things incidental to a Statute.

WHEREVER the provision of a statute is general, every thing which is necessary to make such provision effectual is supplied by the common law.

1 Inst. 235; 2 Inst. 222.

If an offence be made felony by a statute, such statute does by necessary consequence subject the offender to the like attainder and forfeiture, and does require the like construction, as to those who shall be accounted accessaries before or after the fact, and to all other intents and purposes, as a felony at the common law does.

1 Hawk. c. 41, § 4; 3 Inst. 47, 49, 50.

(C) From what Time a Statute takes Effect.

Misprision of felony is as well incidental to a felony created by a statute as to one at the common law.

1 H. H. P. C. 652.

Wherever a power is given by a statute, every thing necessary to the making of it effectual is given by implication: for the maxim is, *Quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud*.

12 Rep. 130, 131; 2 Inst. 306.

If an action of waste should now be given by a statute against tenant in tail after possibility of issue extinct, treble damages would, although not mentioned, be recoverable: for such damages are recoverable under a former statute, by which an action of waste is given; and wherever an old action is given in a new case, all that before appertained to the action is likewise given.

Bro. *Waste*, pl. 68.

(C) From what Time a Statute begins to have Effect.

EVERY statute begins to have effect, unless some other time be appointed, from the first day of that session of parliament in which it is made.

1 Roll. Abr. 465, *Hawe's case*; Bro. *Relat.* pl. 35; Bro. *Parl.* pl. 86; 4 Inst. 25, 27; Hob. 309; Sid. 310; [6 Bro. P. C. 553; 4 Term R. 660; {5 Ves. J. 237, 238.}] This doctrine, that where the commencement of an act was not directed to be from any particular time, it should commence from the first day of the session of parliament in which it passed, though often productive of the most provoking injustice, was sanctioned by so many decisions that the interference of the legislature was necessary to control it. ||For some instances of these inconveniences, see 4 Term R. 463, 660; 6 Bro. P. C. 553; 1 Lev. 91.|| It is therefore enacted, that the clerk of the parliament shall endorse (in English) on every act, the time it receives the royal assent; which endorsement shall be taken to be a part of the act, and to be the date of its commencement, where no other is provided. St. 33 G. 3, c. 13. β In Connecticut, in the absence of any provision expressly fixing a different time, public statutes take effect from the rising of the General Assembly, of which the court will take judicial notice. *Perkins v. Perkins*, 7 Conn. 558.γ

But, where a particular time for the commencement of a statute is appointed, it only begins to have effect from that time.

Ld. Raym. 371; *Rex v. Gale*, Plow. 79; Bro. *Parl.* pl. 86; Hob. 222. β Although in an act of parliament it is expressly enacted that it shall commence and take effect from a day named, yet, if the royal assent be not obtained until a subsequent day, the provisions of a particular section, in terms prospective, do not take effect until such subsequent day. *Burn v. Carvalho*, 4 Nev. & M. 893.γ

||And if the main and principal clause of an act is to come into operation from a day named, the other subsidiary clauses may be held to commence from that day, though it be not so expressed, if it would be inconvenient that they should commence from the passing of the act. Thus, where by the 1st sect. of the 39 & 40 Geo. 3, c. 104, the jurisdiction of the courts of requests in London was enlarged from 40s. to 5l. from 30th of September, 1800; and by § 12, if any action *shall be commenced* in any other court to recover any debt not exceeding 5l. within the jurisdiction, the plaintiff shall not recover any costs, it was held that the words "shall be commenced" must, by necessary construction, be restrained to the date of 30th of September, 1800, and not to the passing of the act, which was on 9th of July preceding.

Whitborn v. Evans, 2 East, 135.

(C) From what Time a Statute takes Effect.

A statute passed to correct an error in a former statute of the same session has relation back to the time of the passing of the 1st statute, and may be read as if incorporated with it.

Attorney-General v. Pougett, 2 Price R. 381.||

If two statutes relative to the same subject are made in the same session of parliament, and no time is fixed for the commencement of either, neither shall have priority; for both have relation to the same day and instant of time; and they shall, although contained in two chapters, be construed as if they had been only one statute.

1 Jo. 22, Standen v. The University of Oxford. [See now the above statute of 33 G. 3.]

It is in the general true, that no statute is to have a retrospect beyond the time of its commencement; for the rule and law of parliament is, that *nova constitutio futuris formam debet imponere non præteritis*.

||2 Inst. 292; 1 Black. Com. 46; and see Couch q. t. v. Jeffries, Burr. R. 2460; Wilkinson v. Meyer, Lord Raym. 1350.|| β The state legislatures can pass no *ex post facto law*: such a law is one which renders an act punishable in a manner in which it was not when the act was committed. Fletcher v. Peck, 6 Cranch, 87; the Constitution of the United States, Art. 1, s. 10, forbids the legislatures of the States to pass any *ex post facto laws*. See 3 Dall. 386; 1 Blackf. 193; 2 Pet. 413; this prohibition does not apply to civil cases. Serg. Const. Law, 356. See 2 Pick. 172; 11 Pick. 28; 2 Root, 350; 5 Monr. 133; 9 Mass. 363; 3 N. H. Rep. 475; 7 Johns. 488; 6 Binn. 271. There is a difference between *retrospective acts*, and *acts ex post facto*, 2 Watts & Serg. 271; 3 Dall. 380. See Bouv. L. D., *Ex post facto*; *Retrospective*.γ {The Constitution of the United States prohibits the passing of any *ex post facto law*. This prohibition relates only to criminal, and not to civil cases. Those laws only are *ex post facto* which either, 1, make an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; or, 2, aggravate a crime, or make it greater than it was when committed; or, 3, change the punishment, and inflict a greater punishment than the law annexed to the crime when committed; or, 4, alter the legal rules of evidence, and receive less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. No law that mollifies the rigour of the criminal law is *ex post facto*; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction. 3 Dall. 386, Calder v. Bull; 1 Bay. 185.}

β Though in a private case between individuals, the court will struggle hard against a construction, which, by a retrospective operation, will affect the rights of parties; yet, in great national concerns, when individual rights acquired by war are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, the court cannot consider whether it is a proper case for compensation, that is the duty of the government.

United States v. The Schooner Peggy, 1 Cranch, 103.

In general, statutes are to be construed to operate *in futuro*, unless a retrospective effect be clearly intended.

Prince v. The United States, 2 Gallis. 204; State v. Judge Bermudez, 12 Lo. Rep. 352.

Statutes can never be applied retrospectively by mere construction.

Jarvis v. Jarvis, 3 Edw. R. 462; Whitman v. Hapgood, 10 Mass. 437; Somerset v. Dighton, 12 Mass. 383; Medford v. Learned, 16 Mass. 215.

When a statute is explicitly retrospective to a certain extent and for a certain purpose, it will not receive a retroactive operation to any greater extent, or for any other purpose.

The Thames Man. Co. v. Lathrop, 7 Conn. 550.γ

(C) From what Time a Statute takes Effect.

A treaty of marriage being on foot between the plaintiff and a person whom he afterwards married, and had 2000*l.* with, as a portion, Shooter, who was of kin to the plaintiff, promised to give him as much, or to leave him as much, by his will. This promise was made before the 24th day of June, 1677. Shooter died in the September following, without having paid the money, or made provision by his will for the payment. An action was brought against his executors, and the question made upon a special verdict was, Whether this promise, it not being in writing, was within the 29 Car. 2, c. 3, whereby it is enacted, "That from and after the twenty-fourth day of June, which shall be in the year of our Lord one thousand six hundred and seventy-seven, no action shall be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed." Judgment was for the plaintiff: and by the court—It cannot be presumed that the statute was to have a retrospect, so as to take away a right of action which the plaintiff was entitled to before the time of its commencement.

Gilmore v. The Executors of Shooter, 2 Mod. 310; 12 Show. R. 17; Jones R. 108; 1 Lev. 227; 1 Vent. 330, S. C.¶

¶By the 9 Geo. 4, c. 14, (which passed May 9, 1828, but by its 10th section was to commence and take effect on 1st of January, 1829,) it is enacted that "in actions of debt, or upon the case grounded on any simple contract, *no acknowledgment or promise by words only shall be deemed sufficient evidence* of a new or continuing contract, whereby to take the case out of the operation of the said enactments, (the Statute of Limitations, 21 Jac. 1 c. 16,) or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." The plaintiff, in Hilary term, 1829, brought an action for a debt more than six years old, and in order to take the case out of the statute of limitations, gave in evidence a verbal promise by the defendant to pay, made in February, 1828. It was held by the Court of Common Pleas that the plaintiff could not recover on this verbal promise by reason of the above clause, which came into operation before the trial, and before the commencement of the action, though subsequently to the promise being made.

Fowler v. Chatterton, 6 Bing. 258. The late Baron Hullock in Kirkhaugh v. Herbert, cited 6 Bingh. 265, is said to have ruled the same at *nisi prius*, though the action was commenced *before* the act came into operation, and Lord Tenterden is stated (*ibid.*) to have held the same. Indeed, it does not appear to matter when the action was commenced. The necessary construction of the statute, *as it is worded*, appears to be that after the 1st of January, 1829, no verbal acknowledgment shall be held sufficient evidence of a continuing contract to take the case out of the Statute of Limitations, whether the acknowledgment were made prior or subsequent to the 1st of January, 1829. But it surely is desirable that statutes should be so framed as to be prospective not merely with reference to the time of an action being brought, or of evidence being offered, but with reference to the making of the contract, or occurring of the matter to which they relate: that is, with reference to the substantial subject matter on which they operate. It is somewhat hard that creditors having, previous to the 1st January, 1829, or to the 9th May, 1828, when the statute passed, sufficiently secured themselves by taking verbal acknowledgments, should by the retrospective effect of the clause be deprived of the remedy for their debts.¶

But a statute may have a retrospect to a time antecedent to that of its commencement.

If a parson hold a farm upon condition not to alienate, and afterwards a

(D) How long a Statute continues in Force.

statute be made which inflicts a punishment upon a parson who alienates a farm holden by him, the condition remains good.

2 Brownl. 142, Portington v. Rogers.

It is said that if A covenant not to do an act which is lawful, and a statute be made afterwards which compels him to do the act, the statute repeals the covenant: or, that if A covenant to do an act which is lawful, and by a statute made afterwards he be forbidden to do the act, the statute repeals the covenant.

Salk. 198, Brewster v. Kitchell, Hil. 9 W. 3.

But it has in a later case been holden, that in construing a statute made after the entering into a contract, the sense of the words ought not to be strained so as to avoid the contract, to the benefit whereof some person was entitled at the time the statute was made.

Ld. Raym. 1352, Wilkinson v. Meyer, East. 10 G. 1. {Vide 1 Bay. 179, Osborne v. Huger.} ||See *ante*, p. 222.||

§ Where an act establishing a new county provided that the act should not take effect and be in force until a certain day, and the governor made an appointment before that day, it was held that such appointment was void.

Commonwealth v. Fowler, 10 Mass. 290.

An act, from its passing, repeals a former act, which ousted clergy from a certain offence, and imposes a new punishment for the same offence, from and after its passing: Held, that an offence committed before the passing of the new act, but not tried till after, is not liable to be punished under either of these statutes.

Rex v. M'Kenzie, R. & R. C. C. 429.g

(D) How long a Statute continues in Force.

SOME statutes are temporary, others are perpetual.

A temporary statute continues in force, unless it be sooner repealed, until the time for which it is made expires; a perpetual one until it is repealed.

[A temporary statute is sometimes made to continue in force after it has ceased to operate substantially, for the purpose of supporting prosecutions against those who have violated it during the term assigned for its continuance.

29 G. 3, c. 64; 33 G. 3, c. 66; 34 G. 3, c. 80, &c. &c.]

Every statute for the continuance of which no time is limited is perpetual, although it be not expressly declared so.

{If, however, a statute, which does not itself contain any limitation, is to be governed by another which is temporary only, the former will also be temporary, and dependent on the existence of the latter: as if the right given by it is made to depend on the production of a certificate to be obtained only by virtue of a temporary statute which is suffered to expire.

7 Term, 673, Ex parte Gallile.}

It is laid down, that if a statute, which was to have continuance only for seven years, have been after the expiration of that term made perpetual by another statute, only the latter statute is to be considered as in force.

Lit. Rep. 213, The case of the College of Physicians.

This case does not seem to be law. The statute against perjury, made

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in the fifth year of the reign of Queen Elizabeth, was only to have continuance till the end of the next parliament. Another parliament commenced in the thirteenth year of her reign, another in the twenty-seventh, and another in the twenty-eighth: but this statute was not made perpetual till the twenty-ninth year of her reign. The first statute has however been always holden to be in force, and the offence of perjury is constantly charged in an indictment to have been committed against the form of that statute.

Owen, 135; West's case, Cro. Eliz. 750; Lutw. 221.

[In a late case, the Court of King's Bench held with great clearness, that if a statute expire, and afterwards be revived by another statute, the law derives its force from the first statute; and that therefore the statute of 21 Jac. 1, c. 4, extends to statutes made since, which revive statutes made before it.

Shipman v. Henbest, 4 Term R. 109.]

In an indictment for perjury in an affidavit for holding to bail, the affidavit was alleged to have been taken by virtue of the 12 Geo. 1, c. 29, a statute made for five years, but which was afterwards continued with some alterations by the 5 Geo. 2, c. 27. It was objected for the defendant, that it ought to have been alleged that the affidavit was taken by virtue of the latter act, and especially as this is not a mere continuing statute, the former being thereby altered. The objection was overruled; and by Lord Hardwicke, C. J.—When a statute is continued, every person is estopped to say that it is not in force; and as there is no alteration in the latter statute as to the subject-matter of the present indictment, it is no more than a continuance of the former *quoad hoc*.

Stra. 1066, Rex v. Morgan.

It is moreover in divers books laid down, that if, before the expiration of a temporary statute, it be made perpetual by another statute, the former statute is as much in force as if it had been at first made perpetual.

Lutw. 221; Anon., Owen, 135; Cro. Eliz. 750.

§ When an act of Congress is revived by a subsequent act, it is revived precisely in that form, and with that effect, which it had at the moment when it expired.

The Cargo of the Brig Aurora v. The United States, 7 Cranch, 382.

{ When a statute is made to continue three years, and from thence till the end of the next session of parliament, this must be intended a session which commences after the expiration of the three years.

1 Vent. 22. }

Divers parliaments have attempted to prevent the repeal of their statutes by subsequent parliaments; but this never could be effected; for a subsequent parliament has always power to abrogate, suspend, qualify, or make void, in the whole or in part, any statute made by a former parliament, notwithstanding any words of restraint or prohibition contained in such statute.

4 Inst. 43. § One legislature is competent to repeal an act which a preceding legislature was competent to pass. Fletcher v. Peck, 6 Cranch, 87.

§ Though one legislature may repeal an act which another legislature was competent to pass, as to usual legislation, yet, when a law is in its nature a contract, and absolute rights have vested under that contract, a repeal of the law cannot divest those rights.

Fletcher v. Peck, 6 Cranch, 135.

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Some parts of *magna charta*, although it be expressly declared by the 42 E. 3, c. 3, that all statutes contrary thereto shall be void, have been repealed, and other parts have been altered by subsequent statutes; yet such statutes have been constantly holden to be in force.

Jenk. Cent. 2.

[But an act cannot be altered or repealed in the same session in which it is passed, unless there be a clause inserted expressly reserving a power to do so.

36 G. 3, c. 20, 21, 22.]

{If one statute be grafted upon another statute relative to it in order to the better execution of a former statute, a repeal of the former statute virtually repeals the others.

1 H. H. P. C. 705; 3 Inst. 99

If an act is revived, explanatory acts, being all attendant upon it, are in effect revived along with it.

2 Burr. 747, Williams v. Rougheedge.}

If a statute, which has been repealed, be afterwards revived, the repealing statute becomes of no force.

2 Inst. 686. β The suspension of a statute for a limited time is not a repeal of such statute. Browne v. Barry, 3 Dall. 365.γ

By the repeal of a repealing statute the original statute is revived.

12 Rep. 7; The Bishops' case, 2 Inst. 686. β A constructive revival cannot operate on any part of an act which has been expressly altered. Chancellor's case, 1 Bland, 663. See Wheeler v. Roberts, 7 Cowen, 536; Finch v. McDowell, 7 Cowen, 537. As to the effect of the repeal of *declaratory* statute, see King v. Waddington, 1 East, 143.γ

|| But the *expiration* of a repealing statute does not necessarily revive the original statute, unless it appear clearly that such was the intention of the legislature.

Warren v. Windle, 3 East, 212. β The expiration of a statute by its own limitation, *ipso facto* revives a statute which had been repealed and supplied by it. Collins v. Smith, 6 Whart. 294. See Chancellor's case, 1 Bland, R. 664.γ

The repeal may be absolute though the repealing statute be only temporary in its substituted provisions.

The King v. Rogers, 10 East, 569.

The 5 Geo. 4, c. 98, which repealed the former bankrupt acts, enacted that after June, 1824, a bankrupt's certificate should not be received in evidence, unless entered of record. The 6 Geo. 4, c. 16, repealed the 5 Geo. 4, c. 98, from May 2, 1825; and the old statutes from the 1st of September, 1825, (the day when the 6 Geo. 4, c. 16, was generally to take effect.) The 6 Geo. 4 provided also that its enactments respecting certificates should take effect from the passing of the act, (2d of May, 1825,) and that certificates on commissions issued after the act took effect should be entered of record. Where a commission was issued in January, 1825, and the certificate obtained in November, 1825, it was held that it did not require to be entered of record: not under the 5 Geo. 4, c. 98, since that was repealed from 2d of May, 1825, and not under the 6 Geo. 4, c. 16, since that only applied, according to a reasonable construction, to certificates on commissions dated *after* the act took effect.

Tattle v. Grimwood, 3 Bing. 493.||

If a statute have been repealed by three different statutes, and only two

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of the repealing statutes are repealed, the third continues in force, and repeals the original statute.

12 Rep. 7, 'The Bishops' case.

If a statute be repealed, all acts done under it whilst it was in force are good; but, if a statute be declared to be null, all acts done under it whilst it was in force are void.

Jenk. 233, pl. 6.

β No proceedings can be pursued under a repealed statute, though begun before the repeal, unless such proceedings are authorized under a special clause in the repealing act.

Road in Hatfield Township, 4 Yeates, 392. See *United States v. Passmore*, 1 Wash. C. C. R. 84; S. C., 4 Dall. 372; *North Canal Street Road*, 10 Watts, 351; *Stoever v. Immel*, 1 Watts, 258; 1 Whart. 460.

But a judgment for costs rendered under a particular law, is not affected by the repeal of such law.

Bechtol v. Cobough, 10 S. & R. 121.γ

{An application was made to the court of quarter-sessions for the discharge of a prisoner under an insolvent debtor's act, and every requisite was complied with by the debtor; but the court voluntarily, and without his application, adjourned the matter to a subsequent day, before which the act was repealed. And on a motion for a mandamus to the sessions to proceed to discharge him, the Court of King's Bench refused to grant it, as no act of jurisdiction could be done by the sessions after the repeal of the statute, though the proceedings had begun before.

3 Burr. 1456, *Rex v. Justices of London*; 1 W. Black. 451, S. C., by the name of *Miller's case*.

So, when the amendment to the Constitution of the United States was adopted, providing that the judicial power of the United States should not be construed to extend to suits against one of the states by citizens of another state, or by citizens or subjects of any foreign state, the Supreme Court of the United States decided that no jurisdiction could be exercised in such suits against a state, though they had been previously brought, and were depending when the amendment was adopted.

3 Dall. 378, *Hollingsworth v. Virginia*.

Offences against a statute committed before the repeal cannot be prosecuted after the repeal, without a special clause to allow it.

1 H. H. P. 291, 309; 1 W. Black. 451; 4 Dall. 372, *United States v. Passmore*.

And if a statute directs that from and after the passing of it no person shall be subject to prosecution by indictment for a particular offence at common law, it puts an end to a prosecution for that offence, commenced and carried to conviction before the passing of the statute, but in which no judgment has been pronounced.

1 Bin. 601, *Commonwealth v. Duane*.}

Every affirmative statute is a repeal, by implication, of a precedent affirmative statute, so far as it is contrary thereto: for *leges posteriores priores ||contrarias|| abrogant*.

11 Rep. 61, *Foster's case*; Show. 520; Ld. Raym. 160; 4 Inst. 43. [The statute of 5 G. 1, c. 27, inflicts a fine, not exceeding 100*l.* and three months' imprisonment, on such persons as shall be convicted of seducing artificers.—The 23 G. 2, c. 13, inflicts a penalty of 500*l.* and twelve months' imprisonment for the same offence. Lord Mansfield held, that the statute was in this respect a virtual repeal of the former. *Rex v.*

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Cator, 4 Burr. 2026. So, *e converso*, where a later statute inflicts a milder punishment than a preceding statute for the same offence. Rex v. Davis, Leach's Cases, 228.] {See also 9 East, 44, Ex parte Caruthers. In those cases the statutes by which the former were held to be repealed, were passed in the subsequent sessions; where both statutes are passed in the same session, the latter is only explanatory. Per Heath, J., in The King v. Brady, 1 Bos. & Pul. 189.}

|| Thus the stat. 13 Geo. 2, c. 28, § 5, exempting generally from the impress service any harpooner, &c., or seaman in the Greenland fishery trade, is impliedly repealed by the 26 Geo. 3, c. 41, § 17, which exempts any harpooner, &c., *whose name shall be inserted in a list* required to be delivered on oath, &c.; and which also exempts any seaman entered on board any ship intended to proceed on the said fishery in the following season, *whose name shall be inserted in a list, &c.*, and *who shall give security, &c.*; for the latter statute superadds the insertion of the seaman's name in such list as a condition precedent to the exemption.

Ex parte Caruthers, 9 East's R. 4.

So, if a former act says that a juror shall have 20*l.* per annum, and a new statute enacts that he shall have twenty marks, here the latter statute, though it does not express, necessarily implies a negative and virtually repeals the former.

Jenk. Cent. 2, 73.

So, the 43 Eliz. c. 2, § 6, which gives an appeal without limitation as to time against overseers' accounts, is virtually repealed by the 17 G. 2, c. 38, § 4, which requires that the appeal shall be to the next general quarter-sessions after allowance of the accounts.

Rex v. Justices of Worcestershire, 5 Maul. & S. 457: and see 1 Price, 438; and see *post* (G) as to affirmation and negative statutes.

The Metropolis Paving Act, 57 Geo. 3, c. 29, § 136, has repealed the *Clink Liberty* Paving Act, 52 Geo. 3, c. 14, as to the time for commencing actions.

Burns v. Carter, 5 Bing. R. 429.||

If a statute, before perpetual, be continued by an affirmative statute, for a limited time, this does not amount to a repeal thereof at the end of that time.

Raym. 397, Anon.; ||Hob. 215.||

[But subsequent statutes, which add accumulative penalties, and institute new methods of proceeding, do not repeal former penalties and methods of proceeding (*a*) ordained by preceding statutes, without negative words. Nor hath a latter act of parliament ever been construed to repeal a prior act, unless there be a contrariety or repugnancy in them, or at least some notice taken in the former law of the preceding one, so as to indicate an intention in the law-makers to repeal it. Neither is a bare recital in a statute, without a clause of repeal, sufficient to repeal the positive provisions of a former statute.

Cowp. 297; 2 Atk. 675.] ||(*a*) Sharp v. Warren, 6 Price 131; Dore v. Gray, 2 Term R. 365.||

If two statutes, repugnant to each other, be made in the same session of parliament, the latter only shall have effect.

6 Mod. 287, The Inhabitants of St. Clement's v. The Inhabitants of St. Andrew's.

If the latter part of a statute be repugnant to the former part thereof, it shall stand, and, so far as it is repugnant, be a repeal of the former part; because it was last agreed to by the makers of the statute.

Fitzgib. 195, The Attorney-General v. The Governor of Chelsea Water-Works.

(E) Of the vast Power of a Statute.

But the law does not favour a repeal by implication, nor is it to be allowed unless the repugnancy be quite plain: for as such repeal carries with it a reflection upon the wisdom of the former parliament, it has ever been confined to the repealing as little as possible of the preceding statute.

11 Rep. 63, Foster's case; 1 Roll. R. 88; 10 Mod. 118; {2 Wash. 296.} ¶See *Rex v. Inhabitants of Idle*, 2 Barn. & A. 149; *Rex v. Drake*, 6 Maul. & S. 116; *Goldson v. Buck*, 15 East, 372.¶

Although two acts of parliament are *seemingly* repugnant, yet if there be no clause of *non obstante* in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication.

Dyer, 347, *Weston's case*; Bro. Parl. pl. 9; 11 Rep. 63; Hard. 344. ¶If a legislative act is in opposition to a constitutional principle, the act must give way. *Vanhorn's lessee v. Dorrance*, 2 Dall. 304; *Calder v. Bull*, 3 Dall. 386; *Marbury v. Madison*, 1 Cranch, 137; *Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Pet. 257; *United States v. Fisher*, 2 Cranch, 358.

¶The repeal of a law leaves all civil rights acquired under the law unaffected.

Arnaud's heirs v. His Executors, 3 Lo. R. 337; *Dixon v. Dixon's executors*, 4 Lo. R. 191.

Where a posterior law has changed the period of prescription established by a former law, prescription must be governed by the posterior law, considered prospectively from the date of its promulgation.

Union Cotton Manufactory v. Lobdell, 7 Mart. R. N. S. 111; *Reeves v. Adams*, 5 Lo. R. 292.

When the provisions of a state law are inconsistent with the stipulations of a treaty which has been adopted, the adoption of the treaty is equivalent to the repeal of the state law.

Den ex dem. Fisher v. Harnden, 1 Paine, 55; *Gordon v. Kerr*, 1 Wash. C. C. R. 322.

After the repeal or expiration of a statute, no penalty can be enforced nor any punishment inflicted for its violation while it was in force, unless some special provision be made for that purpose.

Yeaton v. United States, 5 Cranch, 218; *United States v. Ship Helen*, 6 Cranch, 203.

An act of Assembly cannot be repealed by non-user.

Respublica v. Commissioners, 4 Yeates, 181; *Glaney v. Jones*, 4 Yeates, 215; *Commonwealth v. Hoover*, 1 Browne's R. Appx. 28; *Wright v. Crane*, 13 S. & R. 447.

When the provisions of a revising statute are to take effect at a future period, and such statute contains a clause repealing the former statute upon the same subject, the repealing clause will not take effect until the other provisions come into operation.

Spaulding v. Alford, 1 Pick. 33.

When a statute imposes a new penalty for an offence, it repeals, by implication, so much of a former statute as establishes a different penalty.

Nichols v. Squire, 5 Pick. 168; *Commonwealth v. Kimball*, 21 Pick. 373.¶

(E) Of the vast Power of a Statute.

A STATUTE can do no wrong; but it may do some things which seem very strange: for it may discharge a person from the allegiance he lives under, and restore him to a state of nature.

12 Mod. 688, *The City of London v. Wood*.

(E) Of the vast Power of a Statute.

An estate may be made to cease by a statute in the same manner as if the party possessing had been dead; as is done by the 21 H. 8, c. 13, which declares, that if a person accept a second benefice the first shall be void, in the same manner as if the incumbent had died.

6 Rep. 40, Mildmay's case.

A man may be enabled by a statute to have or be an heir, who otherwise could not have or be an heir.

1 Lev. 75, Wheatley v. Thomas.

An estate-tail may be limited by a statute without a donor; and the validity of such a limitation is not to be measured by the rules of the common law: for a statute can control the rules of the common law.

Raym. 355, Murray v. Eyton, 1 Jon. 105.

A man can only forfeit such estate as he has, as if tenant in tail, with remainder over, forfeit, the remainder is saved. But, if the land of tenant in tail be given to the king by a statute, the remainder is not saved.

Godb. 315, Sheffield v. Ratcliffe.

If the king become entitled by a statute to the land of J S, he takes it discharged of all tenure.

Bro. Parl. pl. 77.

If land, subject to a rent-charge, be given to a person by a statute, the rent-charge is thereby discharged.

Bro. Parl. pl. 28.

A statute cannot make it lawful for A to commit adultery with the wife of B, for the law of God forbids this: but it may dissolve her marriage with B, and so enable her to marry A.

12 Mod. 688, The City of London v. Wood.

A statute may make a woman a mayor or a justice of the peace.

2 Jon. 12, Crow v. Ramsay, per Wilde, J.

The Constitution of the United States contains the following provisions:

Art. 1, § 9, no bill of attainder or *ex post facto* law shall be passed.

Art. 1, § 10, no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

The term *ex post facto* has a technical meaning. It is confined to criminal cases; to legislative acts, which make an act punishable as a crime or offence, which was not so when committed, or which enhances the punishment or penalty of an offence after it has been committed. *Calder v. Bull*, 3 Dall. 386; *Strong v. The State*, 1 Blackf. 193; *Riley's case*, 2 Pick. 172; *Woart v. Winnick*, 3 N. Hamp. Rep. 473, 475; *Dash v. Van Kleeck*, 7 Johns. 477, 488; *Calder v. Bull*, 2 Root, 350; *Locke v. Dane*, 9 Mass. 360, 363; *Fletcher v. Peck*, 6 Cranch, 133; *Society for the propagation of the Gospel v. Wheeler*, 2 Gall. 133; 2 Pet. 681; *Watson v. Mercer*, 8 Pet. 110; 6 Binn. 271; 5 Monr. 133. See *Commonwealth v. Phillips*, 11 Pick. 28; *State v. Harrison*, Harper, 88; *Bennett v. Boggs*, 1 Bald. 74; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

The clause prohibiting the States to pass laws "impairing the obligation of contracts," does not extend to a state law enacted before the Constitution commenced its operation, though such law operate on rights of property vested before that time. *Owings v. Speed*, 5 Wheat. 420. A state law which discharges a bankrupt or insolvent debtor from all liability for any debt contracted before the passage of such law, on his surrendering his property, is void and impairs the obligation of contracts. *Sturges v. Crowningshield*, 4 Wheat. 122; *Farmers', &c. Bank v. Smith*, 6 Wheat. 131; *Roosevelt v. Cebra*, 17 Johns. 108; *Hammett v. Anderson*, 3 Conn. 304; *Boardman v. De Forest*, 5 Conn. 1; *Hamstead v. Read*, 6 Conn. 480; *Hinckley v. Marean*, 3 Mason, 88; *Blanchard v. Russell*, 13 Mass. 1; *Kimberly v. Ely*, 6 Pick. 440; *Betts v. Bagley*, 12 Mass. 572; but such law, it seems, is not unconstitutional if it thus provide for the

(F) Of a public or private Statute.

discharge of a debtor from liability for debts contracted after the passing of the law. *Ogden v. Saunders*, 12 Wheat. 213; *Shaw v. Robbins*, 12 Wheat. 369; *Hicks v. Hotchkiss*, 7 Johns. Ch. R. 297; *Mather v. Bush*, 16 Johns. 233; *Baker v. Wheaton*, 5 Mass. 509; *Smith v. Parsons*, 1 Ham. 236; *Blanchard v. Russell*, 13 Mass. 16; *Walsh v. Farrand*, 13 Mass. 19.

There is nothing in the Constitution of the United States which forbids Congress to pass laws violating the obligation of contracts; though such power is denied to the several states.

Evans v. Eaton, Pet. C. C. R. 322. See *Green v. Biddle*, 8 Wheat. 1; *Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Pet. 257; *Bennett v. Boggs*, Baldw. 74; *Sturges v. Crowningshield*, 4 Wheat. 122; *M'Millan v. M'Neill*, 4 Wheat. 209; *Farmers and Mechanics' Bank v. Smith*, 6 Wheat. 131; *Hinckley v. Marean*, 3 Mason, 88; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

A legislative act founded on a mistaken opinion of what was law does not change the actual state of the law, as to pre-existing cases.

Talbot v. Seaman, 1 Cranch, 1.

A law cannot authorize the taking of private property, except for public use.

Bonaparte v. The Camden and Amboy Rail-Road Company, 1 Baldw. 219.

The Circuit Courts of the United States can inquire only into the constitutional power of the legislature of a state; not on the policy, justice or wisdom of their acts.

Bennett v. Boggs, Baldw. 74.

Congress has power to incorporate a bank.

M'Culloch v. Maryland, 4 Wheat. 316.

An act of Congress laying an embargo for an indefinite time is constitutional and valid.

The United States v. The William, 2 Hall's Am. Law Journal, 255.

An act of Congress giving to the United States a preference over all other creditors is constitutional.

United States v. Fisher, 2 Cranch, 358.

An act of Congress to provide for calling out the militia, to execute the laws of the Union, to suppress insurrection and to repel invasion, is constitutional.

Martin v. Mott, 12 Wheat. 19.

A law of the legislature of Connecticut setting aside the decree of a court, and granting a new hearing to be had before the same court, is not void under the Constitution as an *ex post facto* law.

Calder v. Bull, 3 Dall. 386. See 2 Watts & Serg. 271.

The legislature of a State may confirm past transactions, as, to confirm the sale of real estate.

Leland v. Wilkinson, 10 Pet. 294.

The legislature of a state cannot annul the judgment or determine the jurisdiction of the courts of the United States.

United States v. Peters, 5 Cranch, 115.

(F) Of a public or private Statute.

A STATUTE which relates to all the subjects of the realm is a public statute.

8 Rep. 138, *Barrington's case*. {See 1 Cain. Er. 93.}

The distinction between public and private acts is marked with admirable precision in the following note in the printed report from the committee for the promulgation of

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the statutes:—PUBLIC AND PRIVATE ACTS—IN LEGAL LANGUAGE.—1. Acts are deemed to be *public* and *general acts*, which the judges will take notice of without pleading, viz., acts concerning the king, the queen, and the prince; those concerning all prelates, nobles, and great officers; those concerning the whole spirituality; and those which concern all officers in general, such as all sheriffs, &c.—Acts concerning trade in general, or any specific trade; *sed vide* 1 Term R. 125, acts concerning all persons generally, though it be a special or particular thing, such as a statute concerning assizes, or woods in forests, chases, &c. &c. Com. Dig. tit. *Parliament*, (R.) 2. *Private acts* are those which concern only a particular species, thing, or person, of which the judges will not take notice without pleading them, viz., acts relating to the bishops only; acts for toleration of dissenters; acts relating to any particular place, or to divers particular towns, or to one or divers particular counties, or to the colleges only in the universities. Com. Dig. tit. *Parliament*, (R. 7.) 3. In a *general act* there may be a *private* clause, (Ibid.) and a *private act*, if recognised by a *public act*, must afterwards be noticed by the courts as such. 2 Term R. 569.—2. IN PARLIAMENTARY LANGUAGE.—1. The distinction between *public* and *private* bills stands upon different grounds as to fees.—All bills whatever, from which private persons, corporations, &c., derive benefit, are subject to the payment of fees, and such bills are in this respect denominated *private* bills.—Instances of bills within this description are enumerated in the second volume of Mr. Hatsel's *Precedents of Proceedings in the House of Commons*, edit. 1796, p. 267, &c.—2. In parliamentary language, another sort of distinction is also used; and some acts are called *public general acts*; others, *public local acts*, viz., church acts, canal acts, &c. To this class may also be added some acts which, though public, are merely personal, viz., acts of attainder, and patent acts, &c. Others are called *private acts*; of which latter class some are local, viz. enclosure acts, &c., and some personal, viz., such as relate to names, estates, divorce, &c.*

Although the words of a statute are particular: yet if the intent be general, it is a public statute.

10 Rep. 101, *Beaufage's case*. β Private acts of assembly operate like conveyances, binding only on the parties, and are valid only in so far as they do not conflict with the Constitution. *Campbell's case*, 2 Bland, 209.

If the intent of a statute be particular, it shall, notwithstanding the words are general, be deemed a private statute.

Plow. 204, *Stradling v. Morgan*.

A statute which concerns the king is a public statute; for every subject has an interest in the king, who is the head of the body politic; and consequently ought to be as sensible of that which affects him, as a member of the natural body is of what the head at any time feels.

4 Rep. 77, *Holland's case*; 8 Rep. 28, 138; *Hob.* 227.

β If a statute contain provisions of a private nature, as, to incorporate a bank, yet, if it also contain provisions for the forfeiture of penalties to the state, or for the punishment of offences in relation to such bank, it is a public statute.

Case of C. Rogers, 2 Greenl. 303. See *Jenkins v. Union Turnpike*, 1 Cain. Cas. 85; 3 Cow. 662.

Statutes prescribing the limits of counties and towns are public acts, (a) and so are acts regulating fisheries, (b) of which the court must *ex officio* take notice.

(a) *Commonwealth v. Springfield*, 7 Mass. 9. (b) *Burnham v. Webster*, 5 Mass. 266; *Commonwealth v. M'Curdy*, 5 Mass. 329.

The preamble (c) of the 13 & 14 Car. 2, c. 12, recites divers mischiefs

* It must give additional authority to the extracts which have been made from the Reports of the committees for inquiring into the state of the temporary statutes, and the means of better promulgating the laws, to mention, that they come from the pen of a gentleman universally allowed to have a very exact knowledge of our laws and constitution, I mean Mr. Abbot, one of the representatives for the borough of Helstone in the last and present parliament, and the mover of the resolutions which formed and gave activity to those most useful committees.

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to the public which arise from want of proper regulations concerning the poor; and by § 4, it is enacted, "That, for the redress of the mischiefs intended to be remedied, a workhouse shall be erected in the county of Middlesex." This statute has been holden to be a public statute; because it concerns the safety of the king's person, and the public peace, that a stop should be put to such mischiefs. And the clause for erecting a workhouse has been holden to be public; because, as it refers to the mischiefs mentioned in the preamble, a remedy is thereby provided for such mischiefs in the county of Middlesex.

Sid. 209, *Rex v. Pawlin*. [(c) The recital in the preamble of a public act, of a public fact, is evidence to prove the existence of that fact. *Rex v. Sutton*, 2 Maul. & S. 235.]

A statute which concerns the public revenue is a public statute; but some clauses therein may, if they relate to private persons only, be private; *for a statute may be public in one part and private in another*.

12 Mod. 249; *Anon.* 12; 12 Mod. 613; 10 Rep. 57; Plow. 65; Hob. 227; Sid. 24.

Although a statute be of a private nature, as if it concern a particular trade, yet if a forfeiture be thereby given to the king, it is a public statute.

Skin. 429, *Rex v. Baggs*.

In an action of debt upon a bond the defendant pleaded a certain statute for the discharge of poor prisoners, but did not set it out. Exception was taken, that the statute should have been pleaded at large, because it is a private statute, inasmuch as it does not extend to all poor prisoners, but to such only as were in prison at a time therein mentioned; but by the court—This shall be construed to be a public statute. 1. Because all the people of England may be interested as creditors of the prisoners. 2. It is a charitable act, and therefore ought to have a more favourable construction. 3. As it is a long act and difficult to be pleaded, poor prisoners could never bear the expense of pleading it specially.

Lord Raym. 120, *Jones v. Axen*.

But by the 8 & 9 W. 3, c. 18, for the relief of creditors by making composition with their debtors, in case two-thirds in number and value agree thereto, was holden to be a private statute.

Lord Raym. 390, *Pitts v. Polehampton*; 12 Mod. 249. [This act was repealed by 9 & 10 W. 3, c. 29.]

The judges are not obliged to take notice *of a statute of general pardon, unless they are by such statute directed* so to do; for as a statute of general pardon only relates to offenders, it is not a public statute; and it is by no means a consequence that because a man is enabled to give such statute in evidence upon the general issue, the judges must take notice of it as to any other purpose.

Ld. Raym. 709, *Ingram v. Foot*; 12 Mod. 613.

A statute which concerns trade in general is a public statute; the genus trade being composed of all kinds of trade.

4 Rep. 76, *Holland's case*.

But a statute, which relates only to a particular trade, or to a particular person of that trade, is a private statute; because the particular trade is a species of the genus trade, and the particular person is an individual of that species.

4 Rep. 76, *Holland's case*; [1 Term R. 125.]

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The statute against non-residence and that against pluralities are public statutes; because they extend to every species of the spirituality.

4 Rep. 120, Dumpor's case; 2 Roll. Abr. 465; 4 Rep. 76.

But a statute which concerns only a certain species of the spirituality, as the bishops; or an individual of a certain species, as a particular bishop; is a private statute.

4 Rep. 76, Holland's case; Roll. Abr. 466; Cro. Ja. 112; 2 Mod. 57.

The statute of first Westminster, which says, *that no sheriff or other minister of the king shall take any reward to do his office, but be satisfied with what he receives from the king*, is a public statute; because it extends to all officers.

4 Rep. 76, Holland's case.

||The 14 & 15 Hen. 8, c. 5, appointing and regulating the College of Physicians, is a public act; the last section extending to all persons in England.

Coll. of Physicians v. Harrison, Moo. & Malk. Ca. 191; and see Gilb. Evid. 10, 13.

So it is said that the act of Bedford Levels and that for rebuilding Tiverton are, from the publicity of the subject-matter, public acts, and that a printed copy may be given in evidence.

B. N. P. 225; 12 Mod. 216.||

The 23 H. 6, c. 10, which is confined to sheriffs, has in divers cases been holden to be a private statute.

2 Saund. 154; Benson v. Welby, Trin. 22 Car. 2; Plow. 65; Sid. 24, 439.

But the contrary has been laid down in other cases; and in one subsequent to the case in Saunders, Holt, C. J., was of opinion, that this is a public statute; [and that opinion has been since confirmed by the Court of King's Bench.]

2 Lev. 103, Okey v. Sell, Pasch. 26 Car. 2; 1 Lev. 83; Sid. 23; [Samuel v. Evans, 2 Tern R. 569;] ||Lovell v. Sheriffs of London, 15 East, 320; 2 Saund. 155, note.||

The statute made in the time of Henry the Sixth, by which *all corporations and licenses granted by that prince are declared to be void*, was holden to be a private statute; because, as it does not extend to all corporations, it is not general, but particular in a generality, or, to speak with more propriety, general in a particularity.

Plow. 65; Dyer v. Manningham, Bro. Parl. pl. 6; 4 Rep. 76; Dyer, 119.

||The statute 53 Geo. 3, c. 152, intituled *An act to continue until the first day of January, 1819, an act made in the fifty-first year of his present majesty, to explain and amend the laws touching the election of knights of the shire to serve in parliament for England, respecting the expenses of hustings and poll-clerks, so far as regards the city of Westminster* is a public act, since it relates to one branch of the legislature.

Morris v. Hunt, 1 Chit. R. 453.||

In many statutes which would otherwise have been private, there are clauses by which they are declared to be public statutes.

[Note, the distinction between *private* acts, and *public*, was first made in the reign of Richard III., who applied this new invention to the purpose of destroying his enemies by parliamentary attainders. Reeves's Hist. Engl. Law, vol. iii. 379, vol. iv. 129, 130.]

||But if an act of parliament be of a private nature, it does not derive any additional weight or authority from having a clause declaring it to be a

(G) Of an affirmative or negative Statute.

public act. It must still be construed as a private act. The only object of the proviso making it a public act is, that it may be judicially taken notice of, and to save the expense of proving an attested copy. Such acts, passed on the petition of individuals, are to be construed as private agreements between parties.

3 Bos. & Pul. 565 ; 8 Term R. 468 ; 2 Term R. 705 ; 2 Black. Com. 346.

Private acts for settling estates are construed like common conveyances.
1 Term R. 93.

It has always been held that a private act does not bind strangers : and this before the general practice prevailed of inserting a saving clause in every private act. Lord Hale says, "Every man is so far party to a private act as not to gainsay it, but not so as to give up his interest. It is the great question in *Barrington's case*, 8 Co. The matter of the act there directs it to be between the foresters and the proprietors of the soil ; and therefore it shall not extend to the commoners, to take away the common. Suppose an act says, whereas there is a controversy concerning land between A and B, it is enacted that A shall enjoy it ; this does not bind others, though there be no saving, because it was only intended to end the difference between two."

Lucy v. Livingstone, 1 Vent. 176.

It has been held that a private act will bar an estate-tail, and all remainders expectant thereon, and also the reversion, although the rights of the remaindermen were not excepted out of the saving clause. But, where a tenant for life enters into an agreement to convey the fee-simple, and a private act is passed for establishing such agreement, in which is a saving of the rights of all persons not parties to the act, it will not affect the persons entitled to the remainder expectant on the life-estate.

Westby v. Kiernan, Amb. 697 ; *Provost of Eton v. Bishop of Winchester*, 3 Wils. 483 ; and see Cru. Dig. vol. v. p. 9, (3d edition.)

A private act is not printed or published among the other laws of the session : it hath been relieved against when obtained upon fraudulent suggestions, and hath been holden void if contrary to law and reason ; and no judge or jury is bound to take notice of it unless the same be specially set forth and pleaded to them.

2 Black. Com. 346 ; 4 Co. R. 12.

Ambiguous words in a private act incorporating a company are to be construed against the company, and in favour of private rights of property.

Scales v. Pickering, 4 Bing. R. 448.¶

(G) Of an affirmative or negative Statute.

SOME statutes are, from their being in affirmative terms, called affirmative statutes ; others obtain the name of negative statutes, because they are penned in negative terms.

It is a maxim of law, *that an affirmative statute does not take away the common law.*

2 Inst. 200 ; 1 Inst. 111, 115 ; Show. Parl. Ca. 64. ¶See 7 Term R. 628.¶ A declaratory statute cannot deprive an individual of a vested right, nor change a rule of construction as to a pre-existing law. *Salters v. Tobias*, 3 Paige, 338.¶

{If a statute, without any negative words, declare that deeds shall have in evidence a certain effect, provided particular requisites are complied with, this does not prevent their being used as evidence, though the re-

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quisites are not complied with, in the same manner as they might have been before the statute passed.

2 Cain. 169, Jackson v. Bradt.}

By the 43 E. 3, c. 11, it is enacted, "That the pannel of assize shall be arrayed four days before the day of assize;" yet, if this be done two days before the day of assize, it is good; for two days were sufficient at the common law, and where a statute is affirmative it does not take away the common law.

Bro. Parl. pl. 70.

The statute of Marlbridge, c. 21, and the statute of 2 Westm. c. 39, are, "That after complaint made to the sheriff he may take the *posse comitatus*, and make replevin." Notwithstanding this statute the sheriff may take the *posse comitatus* to serve any process with, as he could before at the common law; for an affirmative statute does not take away the common law.

Bro. Parl. pl. 180.

Although an affirmative statute do not take away the common law, it is nevertheless binding; and a party may take his election to proceed upon the statute, or at the common law.

2 Inst. 200; Bro. Parl. pl. 70; 1 Rep. 64; Cro. Eliz. 104.

It is in the general true, that if an affirmative statute, which is *introductive of a new law*, direct a thing to be done in a certain manner, that a thing shall not, even although if there are no negative words, be done in any other manner.

Plow. 206, Stradling v. Morgan; Hob. 298; Sid. 56; {3 Mass. T. Rep. 307, Gedgey v. Inh. of Tewksbury.}

But, where the question was, whether an appointment of overseers, made after the expiration of the time limited by a statute for such appointment, was valid? It was holden to be so; and by the court—The 43 Eliz. c. 2, ought to have a liberal construction; because it is a statute under which provision is to be made for the poor. As it was not in the power of the parish to compel the justices to make an appointment within the time, the appointment ought *ex necessitate* to be holden good. Although that statute be introductive of a new law, no negative ought to be implied against the meaning and justice thereof.

Stra. 1123, Rex v. Sparrow; [Rex v. Stubbs, 2 Term R. 395, S. P.]

|| And so, though the 54 Geo. 3, c. 84, enacts that the Michaelmas quarter-sessions shall be held in the week next after the 11th of October, it is held merely directory, and those sessions may still be held at another time—but *negative* words would have made the statute imperative.

Rex v. Justices of Leicester, 7 Barn. & C. 6.||

If a new power be given by an affirmative statute to a certain person, or to certain persons, by the designation of that one person, although it be an affirmative statute, all other persons are in the general excluded from the exercise of the power; it being a maxim, that *inclusio unius est exclusio alterius*.

11 Rep. 64, Foster's case; || Warden of St. Paul's v The Dean, &c., 4 Price, R. 65.||

If an action founded upon a statute be directed to be brought before the justice of Glamorgan in his sessions, it cannot be brought before any other person, or in any other place.

Plow. 206, Stradling v. Morgan.

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It being by the 31 Eliz. 3, c. 12, provided, "That error in the Exchequer-chamber shall be amended before the chancellor and treasurer," such error cannot be amended before any other person or persons.

11 Rep. 59, Foster's case.

By the 26 Geo. 2, c. 22, for establishing the British Museum, some acts are directed to be done by the majority of the trustees. It was so clear, that the acts could not be done by the majority of the trustees present at a meeting, unless that majority were likewise a majority of the whole trustees, that the 27 Geo. 2, c. 16, was made for enabling the majority of those trustees who shall be present, provided that seven are present, at any meeting to do these acts.

But the designation of a certain person, to whom a new power is given by an affirmative statute, does not exclude another person, who was, by a precedent statute, authorized to do it, from doing the same thing.

11 Rep. 64, Foster's case; ||and see Davis v. Edmonson, 3 Bos. & Pul. 387.||

By the 8 Hen. 6, c. 16, it is provided, *That after office found he who finds himself aggrieved may within a month offer his traverse, and to take the premises to farm; and that the chancellor, treasurer, or other officer shall demise them to him to farm.* By the 1 Hen. 8, c. 16, liberty is given to the person aggrieved, *to do this at any time within the space of three months.* Afterwards the 32 Hen. 8, c. 40, authorizes the master of the wards *to grant a lease of the lands of a ward or an idiot while they remain in the hands of the crown.* This last statute, notwithstanding the designation of a new person, shall not take away the power given by the former; for if, before any lease is granted by the master of the wards, the chancellor, or treasurer, grant a lease of the premises, the master of the wards cannot afterwards demise them.

Stamf. Prer. 69; 11 Rep. 64.

An affirmative statute, even if there are negative words in it, does not, in many cases, exclude the jurisdiction of the Court of King's Bench; because the pleas there are before the king himself.

1 Rep. 64, Foster's case.

A negative statute so binds the common law, that a man cannot afterwards make use thereof.

Bro. Parl. pl. 72.

At the common law, if a lord distrained for customs, services, or other duties, when none were behind, an action of trespass lay: but since the statute of Marlbridge, ||52 Hen. 3, c. 3,|| the words of which are, *Si quis major vel minor districtiones faciat super tenementum suum, pro servitiis vel consuetudinibus quæ sibi deberi dicat, vel pro re altera, unde ad dominum feodi pertineat districtiones facere, et postea convincatur quod tenens ea sibi non debet, non ideo puniatur dominus per redemptionem,* it has been holden that in such case no action lies at the common law.

2 Inst. 105; Bro. Parl. pl. 72.

A woman, as well as a man, might at the common law have had an appeal of the death of one of her ancestors: but a woman can now only have an appeal in the case of her husband's death; it being by Magna Charta, c. 34, declared, *quod nullus capiatur aut imprisonetur propter appellum fæminæ de morte alterius quam viri sui.*

2 Inst. 68; Bro. Parl. pl. 72.

(H) Whose Province it is to construe a Statute.

An affirmative statute does not take away a custom.

1 Inst. 111, 115. [In another place Lord Coke lays down the like rule as to an affirmative statute not taking away the common law, but with more particularity. For his words are, that *a statute made in the affirmative without any negative expressed or implied, does not take away the common law.* 2 Inst. 200. This seems to be the justest way of stating the rule both as to common law and customs. Hargr. & Butl. Co. Lit. 115 a, *notis.*]

||Therefore the inhabitants of the hundred of Battle, having by charter and immemorial custom enjoyed the privilege of not serving on juries out of the hundred, were held not to be deprived of their exemption by the several statutes respecting juries—the words of those statutes being affirmative only.

The King v. Pugh, Doug. R. 188.||

It is laid down that a custom is good against a negative statute, unless a new law be thereby introduced; for that if the statute be only declaratory of the common law, as a man might have alleged a custom against the common law, so he may against such statute.

1 Inst. 115.

But it has been since holden, that no prescription or custom is good against a negative statute, whether it be declaratory of the common law, or introductory of a new law.

1 Jon. 271, *Ld. Lovelace's case*; 2 Bulstr. 36; Show. 420; Show. Parl. Ca. 175; [*sed vide* Hargr. & Butl. Co. Lit. 115 a, note (9); *vide etiam* 2 Hawk. P. C. c. 10, § 8.]

(H) Whose Province it is to construe a Statute.

THE power of construing a statute is in the judges; who have authority over all laws, and more especially over statutes, to mould them according to reason and convenience to the best and truest use.

Hob. 346, *Sheffield v. Ratcliffe*, Plow. 109; 3 Rep. 7. {In the United States the legislature cannot pass an act declaring what the law is, but only what it *shall be*. Such an act, as a *declaratory* one, would not be binding on the courts; although as a *legislative opinion*, it would deserve and receive very respectful consideration. 2 Cran. 272, *Ogden v. Blackledge*; 3 Cain. 68, 69, *Jackson v. Phelps*.}

But only the judges of the temporal courts have the power of construing a statute.

Mar. 90, pl. 148; 2 Inst. 614. [If the misinterpretation of an act of parliament directory to an inferior court, in a proceeding confessedly within their jurisdiction, be the subject of *appeal*, and not of *prohibition*, as seems to be pretty generally admitted, the position in the text is stated too broadly. 2 H. Bl. 536; 4 Term R. 398.] ||But it has now been decided by the Court of King's Bench on elaborate argument, that such misinterpretation is a ground of prohibition. Gould v. Gapper, 5 East, 345.||

An ordinary cannot impose a new condition in a bond of administration, but must take such bond according to 21 H. 8, c. 5, and when an action is brought upon it, the meaning of that statute, and of the condition, must both be ascertained by a court of common law.

Hob. 83, *Slawney's case*.

A question arising, whether a person were a bankrupt? it was objected, that as the jury had only found the evidence, and had not drawn the conclusion, the court cannot do this. The objection was not allowed; and by the court—The court may conclude from the evidence whether the person were a bankrupt within the meaning of any statute.

2 Jon. 142, *Dodsworth v. Anderson*.

(I) Rules to be observed in the Construction of a Statute.

In an action brought for the penalty given by the 5 Ann. c. 14, it was found by a special verdict, that the defendant carried on the trade of a poulterer; that for the carrying on of this trade he kept an open shop, wherein he bought and sold geese, chickens, and other poultry; that he had a hare in his custody, and did sell the hare to J S for four shillings; and that at the time of having the hare in his custody, and of selling it, he was seised in fee of an estate of one hundred pounds a year. The question being, Whether the plaintiff were a chapman within the meaning of the 5 Ann. c. 14? it was holden that he was not. In arguing this question, it was said, that as the jurors have only found facts, and have not expressly found that the defendant was a chapman within the meaning of that statute, the plaintiff ought not to have judgment, although the court should be of opinion that the defendant was a chapman within the meaning of that statute. The opinion of the court upon this point was, that as the question, Whether the defendant was a bankrupt within the meaning of that statute? does in a great measure depend upon the construction of that statute, it is a proper question for the determination of the court; and that the facts found are sufficient to enable the court to determine it. In this case the authority of *Dodsworth v. Anderson*, 2 Jon. 142, was recognised.

Sayer, 121, *Hearle, qui tam, v. Boulter*, Hil. 28 G. 2.

(I) Rules to be observed in the Construction of a Statute.

1. *Words and Phrases, the Meaning of which in a Statute has been ascertained, are, when used in a subsequent Statute, to be understood in the same Sense.*

THE best rule to arrive at the meaning and intention of the law, is to abide by the words which the law-maker has used.

United States v. Bright, C. C. Penns. Dist. Act, 1809, Pamph. page 188.

The interpretation to be given to the language used to express the intention, should be such as to make the provisions of the statute consistent with reason.

Varrick v. Briggs, 6 Paige, 323.

When terms of art or peculiar phrases are made use of, it must be supposed that the legislature had in view the subject matter about which such terms or phrases are commonly used.

Ex parte Hall, 1 Pick. 261; 4 Pick. 405; 24 Pick. 296.

The popular sense is the true one where the act of the legislature does not relate to a technical subject.

Macy v. Raymond, 9 Pick. 285.

When the words of a statute are not precise and clear, the construction best adapted to accomplish the objects of the statute will be adopted.

Commonwealth v. Kimball, 24 Pick. 366.

When a statute uses a word which is well ascertained at common law, the word shall be understood in the statute in the same sense in which it is understood at common law.

Kitchen v. Tyson, 3 Murph. 314.

Exception was taken to an indictment upon the 14 Car. 2, c. 12, against churchwardens and overseers, for not having made a rate to reimburse a constable, that the statute only puts it in their power by the word *may* to make such rate, but does not require the doing it as a duty, for the omis-

(I) Rules to be observed in the Construction of a Statute.

sion of which they are punishable ; the exception was not allowed : and by the court—Where a statute directs the doing of a thing for the sake of justice or the public good, the word *may* means the same as the word *shall*. The 23 H. 6, says the sheriff *may* take bail ; but the construction has been that he *shall* do this.

Salk. 609 ; Rex v. Barlow, Vern. 154. || So in the stat. 8 & 9 W. 3, c. 11, § 8, the words “ *may* assign,” and “ *may* suggest” breaches are held compulsory on the plaintiff to proceed according to the statute. 5 Term R. 636 ; 2 Wils. 377. || β In general the word *may* is to be construed *must*, in all cases where the legislature mean to impose a positive and absolute duty, and not merely a discretionary power. Minor v. The Mechanics’ Bank, 1 Pet. 64 ; Newburg Turnpike v. Miller, 5 Johns. Ch. R. 113.γ

Every crime, the perpetrator of which is by any statute ordained to have judgment of life or member, is a felony ; although the word *felony* be not contained in the statute.

Bro. Coro. 204 ; 1 Inst. 391 ; 2 Inst. 434 ; 3 Inst. 91 ; Hob. 293 ; 1 Hawk. c. 41, § 2.

But, if an offence be only prohibited by a statute upon pain of forfeiting all that the offender has ; or of forfeiting his body and goods ; or of being at the king’s will for body, land, and goods ; it shall amount to no more than a misdemeanor.

1 Inst. 391 ; 3 Inst. 145, 146 ; Hob. 270, 293.

If an act of parliament say, *an offender shall be punished according to his demerit*, these words import only, that he shall be punished in the ordinary course of justice by indictment.

4 Inst. 171.

When a statute gives a penalty *to be recovered before justices of the peace*, but prescribes no method of recovering it, the proper method is by indictment.

Salk. 606, Anon.

An information exhibited against the defendant, a sadler, for a penalty given by the 1 Jac. 1, c. 22, was quashed ; and by Lord Mansfield, C. J.—Where a power is given, as is done in the present case, by a statute, *to inquire, hear, and determine*, it always means according to the course of the common law by a jury ; and the proceeding must, in such case, be by indictment.

MS. Rep. Rex v. Williams, Trin. 30 G. 2.

β The terms used in laws imposing duties on importation of goods are to be construed according to the commercial understanding of such terms.

Elliott v. Swartwout, 10 Pet. 137 ; The United States v. Twenty-four coils of cordage, 1 Baldw. 505.γ

2. In the Construction of one Part of a Statute every other Part ought to be taken into Consideration.

The most natural and genuine way of construing a statute is to construe one part by another part of the same statute ; for this best expresseth the meaning of the makers ; and such construction is *ex viceribus actus*.

1 Inst. 391 ; β Pennington v. Coxe, 2 Cranch, 33 ; United States v. Fisher, 2 Cranch, 358 ; The Sloop Elizabeth, Paine, 11 ; Strode v. Stafford, 1 Brocken, 162 ; Canal Co. v. Rail-Road Co., 4 Gill & Johns. 4 ; Opinion of the Justices, 22 Pick. 571 ; Holbrook v. Holbrook, 1 Pick. 248.γ

If any part of a statute be obscure, it is proper to consider the other parts ; for the words and meaning of one part of a statute frequently lead to the sense of another.

Plow. 365 ; Stowel v. Zouch, 11 Mod. 161.

A statute ought, upon the whole, to be so construed, that, if it can be pre-

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vented, no clause, sentence, or word shall be superfluous, void, or insignificant.

1 Show. 108; *Rex v. Burchett*, Hard. 344.

¶ When great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain, in which case it must be obeyed.

Fisher v. Blight, 2 Cranch, 386.¶

[Where words in a statute are express, plain, and clear, the words ought to be understood according to their genuine and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the statute, by reason of some subsequent clause, from whence it might be inferred that the intent of the parliament was otherwise. And this holds with respect to penal as well as other acts.

Parker, 233; *Hob.* 93, 97.] ¶ *United States v. Bright*, C. C. U. S. District of Penn., Pamph. p. 188.¶

¶ General expressions in statutes may be restrained by subsequent particular words, which show that in the intention of the legislature, those general expressions are to be used in a particular sense.

Adams v. Wood, 2 Cranch, 341.¶

{Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. But if, from a view of the whole law, or from other laws *in pari materia*, the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that in fact is the will of the legislature.

2 Cran. 386, 399, *United States v. Fisher*.

If a section be introduced which is a *stranger to* and unconnected with the purview of the act, it must nevertheless take effect according to its obvious meaning, independent of all influence from other parts of the law. And even if it be a part of the same subject, and either enlarges or restrains the expressions used in other parts of the same act, it must be interpreted according to the import of the words used, if nothing can be gathered from such other parts of the law to change the meaning. But if, in this latter case, general words are used which import more than seems to have been within the purview of the law, or of the other parts of the law, and those expressions can be restrained by others used in the same law, or in any other upon the same subject, they ought to be restrained.

So if the literal expressions of the law would lead to absurd, unjust, or inconvenient consequences, such a construction should be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may fairly be done.}

The title of a statute is not to be regarded in construing it, because this is no part of the statute.(a)

Hard. 324; *Ld. Raym.* 77. {*Contra*, 2 Cran. 386, 400, *United States v. Fisher*.} ¶(a) But in the more ancient statutes which are penned with less precision and detail, the title is often material, as in the statute 4 Edw. 3, c. 7, giving a remedy to executors for certain trespasses. Vide 7 East, 132, 4.¶

It is in the general true, that the preamble of a statute is a key to open the mind of the makers as to the mischiefs which are intended to be remedied by the statute.(b)

Plow. 369; *Powell v. Zouch*, 1 Inst. 79. [(b) So, the civilians say, *Cessante legis*

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præmio, cessat et ipsa lex.—But, if the preamble to a statute be a key to its construction, it is to be lamented, that it so rarely states the real occasion of the law, and the views of the proposer of it. The most common recital for the introduction of any new regulation, is to set forth, *that doubts have arisen at common law*, which frequently never existed; and such preambles have, therefore, much weakened the force of the common law in several instances. See Mr. Barrington's Observations on the more Ancient Statutes, p. 394, 411, 477, to which add 32 G. 3, c. 60.] β The enacting clause may be restrained by the preamble, when no inconvenience will be sustained by such construction, otherwise not. *Seidenbender v. Charles*, 4 S. & R. 166; *Kent v. Somerville*, 7 Gill & Johns. 266.γ

But this rule must not be carried so far as to restrain the general words of an enacting clause by the particular words of the preamble: for there was a time when statutes were made without preambles; and the preamble of a statute is no more than a recital of some inconveniences, which does not exclude any other, for which a remedy is given by the enacting part of the statute.

8 Mod. 144; *Rex v. Althoes*, 6 Mod. 62; *Palm.* 486; 1 Jon. 164; 2 Atk. 205. β When a statute is in itself ambiguous and difficult of interpretation, the preamble may be resorted to, but not to create a doubt or uncertainty, which otherwise would not exist. *James v. Du Bois*, 1 Harr. (N. J.) R. 285. The recital in the preamble does not limit the general words of the enacting clause to the cases recited in the preamble. *Gaunt v. Brockman*, *Hardin*, 335.γ

||In the case of *Kinaston v. Clark*, 2 Atkins's R. 205, Lord Hardwicke, says, There are many cases where the enacting part of a statute extends further than the preamble, even in criminal matters; as in an act made in 33 H. 8, c. 23, for trying treasons and murders, where the words, being within the king's dominions, or without it, have been extended to trials in the West Indies,(a) and persons have been tried and executed there by virtue of this act.

(a) But the West Indies would seem within the preamble as well as the enacting clause; for the preamble mentions "places in this realm, and other the king's dominions."

And in *Basset v. Basset*, on the construction of the 10 & 11 W. 3, c. 16, enabling posthumous children to take, Lord Hardwicke says, "if the enacting words can take it in they shall be extended for that purpose, though the preamble does not warrant it; and innumerable instances of this kind are in the law-books."

3 Atk. 203.

If the words of the enacting clause give a clear and definite remedy for the grievance recited in the preamble, their import cannot be enlarged so as to include another remedy, although the words of the preamble would seem intended to introduce a more extensive remedy than that given. Thus, although the stat. 3 W. & M. c. 14, for relief of creditors against fraudulent devises, seems to allude to all specialty debts, and although the second section, in general terms, makes void wills of land, &c., against specialty creditors, yet as the specific remedy given by § 3, is an action of *debt* on such bonds and specialties against the heir and devisee, it is decided that an action of *covenant* will not lie against a devisee for a breach of covenant by the devisor, but that the remedy is confined to cases where *debt* lies.

Wilson v. Knubley, 7 East, 128.|| β Latter words describing the remedy, imply a restriction on those which precede them. *Adams v. Woods*, 2 Cranch, 341.γ

It was said by Lord Cowper, that he could by no means adopt the notion, that a preamble shall restrain the operation of an enacting clause; and

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he added, that if the preamble of the Coventry act had only recited the barbarity of slitting Coventry's nose, and the enacting clause had been general against the doing of any thing whereby a man is disfigured or defaced, it might, agreeably to that notion, have been said, that cutting off the lip, or putting out an eye, would not have been within the meaning of this statute, because neither of these is mentioned in the preamble.(a)

1 P. Wms. 320, *Copeman v. Gallant*. [(a) But this opinion of Lord Cowper with respect to the operation of the preamble, is expressly disapproved of by Lord Chief Baron Parker, and Lord Hardwicke, in *Ryal v. Rowles*, 1 Atk. 174, 182; and 1 Ves. 365, 371; for though, in many cases, the preamble will not restrain the general purview, as in *Sir W. Jones*, 163; *Palm*. 485, on the construction of the statute of the 13th Eliz., yet it is a rule, and so agreed there, that where the not restraining the generality of the enacting clause will be attended with inconvenience, the preamble shall restrain it. So, though the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms, yet, if any doubt arise on the words of the enacting part, the preamble may be resorted to, to explain it. 4 Term R. 793; §13 Ves. 36.¶—However, where enacting words will take in the mischief intended to be prevented, they shall be extended for that purpose, though the preamble does not warrant it; and innumerable instances of this kind are in the law-books. 3 Atk. 204; *Cowp*. 543;] ¶*The King v. Pierce*, 3 Maul. & S. 66. So as to stat. 32 H. 8, c. 37. See Lord Raym. 172; *Co. Lit.* 162, *antè*, tit. *Rent*, (K) 6. And in a late case Lord Tenterden thus stated the rule on the subject:—"In construeing acts of parliament we are to look not only at the language of the preamble, or of any particular clause, but at the language of the whole act. And if we find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the act, and upon a view of the whole act we can collect the real intention of the legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause." 7 Barn. & C. 660.¶

The general words in one clause of a statute may be restrained by the particular words in a subsequent clause of the same statute.

8 Mod. 8, *Rex v. The Archbishop of Armagh*; {2 Cran. 341, *Adams v. Woods*. See 2 Cran. 23, 24, 52.} ¶In 2 Term R. 164, Buller, J., said, "If in the same act of parliament there is one clause which applies to a particular case, and another which is conceived in general terms, the former shall not restrain the signification of the latter." These apparently conflicting *dicta* seem to be both equally correct when applied to the separate subject-matters of which the judges were speaking. Of so little value are such general remarks, when separated from the whole judgment, and the facts of the case.¶ *Adams v. Woods*, 2 Cranch, 341.¶

If by a statute lands are *disgavelled to all intents and purposes*, and *made descendible as lands at the common law*, the former general words are so restrained by the particular subsequent words, that, although the partibility of an estate by which many families have been reduced to a low estate be thereby put an end to, the custom to devise is not taken away; for this custom is a privilege at the common law, and no part of the custom of gavel-kind.

1 Lev. 80, *Wiseman v. Cotton*.

The general enacting words of a statute are not to be restrained by any words introductory to the enacting words.

8 Mod. 144; *Rex v. Althoes*, *Palm*. 486; 1 Jon. 164.

If a particular thing be given or limited in the preceding part of a statute, this shall not be taken away or altered by any subsequent general words of the same statute.

1 Jon. 26, *Standon v. The University of Oxford*.

A saving in a statute, which is repugnant to the purview of the statute, is void.

1 Rep. 47, *Alton Wood's case*; *Plow*. 564.

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The purview of a statute may be qualified or restrained by a saving in the statute ; but, if the saving be repugnant to the purview, it is void.

1 Jon. 339 ; Rex v. Prest, 10 Mod. 115. β The meaning of *purview* seems to be the enacting part of a statute in contradistinction to the preamble. Payne v. Conner, 3 Bibb, 181.γ

If a proviso in a statute be directly contrary to the purview of the statute, the proviso is good, and not the purview ; because it speaks the later intention of the legislators.

Fitz. 195, The Attorney-General v. The Governors of Chelsea Waterworks.

β A statute inexplicable, contradictory, or altogether absurd, may be declared void.

Campbell's case, 2 Bland, 209.γ

[As one chapter in a statute may be both general and particular, because one chapter may contain divers acts and laws, which may be as several in their natures as if they were in several chapters ; so, by parity of reason, where there are different provisions for different purposes, and penned in different words in the same chapter, they ought to be so construed, to avoid inconsistency, as if they had been in different chapters.

Hob. 226 ; Parker, 13, 14.]

{By a statute passed on 9th July, the jurisdiction of a court of requests is enlarged, after 30th September following, from debts of 40s. to 5*l.* ; and it is also enacted that if any action *shall be commenced* in any other court for a debt not exceeding 5*l.*, the plaintiff shall not recover costs. Yet, from the necessary construction of the whole act, a plaintiff shall recover costs in an action commenced in another court for a debt between 40s. and 5*l.* after the passing of the act and before the 30th September. Till that time he could not sue in the court of requests, and therefore had no other remedy but to sue in another court.

2 East, 135, Whitborn v. Evans.}

3. *If divers Statutes relate to the same Thing, they ought to be all taken into Consideration in construing any one of them.*

[It is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law.

Dougl. 20.] ||See 2 Term R. 387 ; 586 ; 4 Maul. & S. 210 ;|| β Canal Co. v. Railroad Co., 4 Gill & Johns. 5 ; Talbot v. Seeman, 1 Cranch, 35 ; Church v. Crocker, 3 Mass. 17 ; Thayer v. Dudley, 3 Mass. 296 ; Holland v. Makepeace, 8 Mass. 418 ; Holbrook v. Holbrook, 1 Pick. 248 ; Mendon v. Worcester, 10 Pick. 235 ; Commonwealth v. Cambridge, 20 Pick. 267 ; Goddard v. Boston, 20 Pick. 407.γ

If one statute prohibit the doing of a thing, and another statute be afterwards made, whereby a forfeiture is inflicted upon the person doing that thing, both are to be considered as one statute.

Plow. 206, Stradling v. Morgan.

When an action founded upon one statute is given by a subsequent statute in a new case, every thing annexed to the action by the first statute is likewise given.

Bro. *Waste*, pl. 68.

A statute lately made may be holden to be within the equity of a statute made long since ; and there are in our books frequent instances of its having been so holden.

4 Rep. 4, Vernon's case.

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If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute.

Ld. Raym. 1028, Sir Wm. Moore's case; 2 Jon. 63.

The 13 Eliz. c. 10, *concerning leases made by spiritual persons*, being enlarged by the 14 Eliz. c. 11, although only the former of these statutes be recited in the 18 Eliz. c. 11, it has been holden, that the latter is virtually recited therein.

1 Vent. 246, Bayley v. Murin.

In the same case it is laid down that there is such a connection betwixt all the statutes concerning leases made by ecclesiastical persons, that they are all to be taken into consideration in the construction of any one of them. The 32 H. 8, c. 28, is not recited in the 1 Eliz. c. 19, nor in the 13 Eliz. c. 10, yet a lease is not warranted by either of these statutes, unless it have the qualifications required by the 32 H. 8, c. 28.

The 22 and 23 Car. 2, c. 10, *for the better settling of intestates' estates*, is continued with some additional clauses by the 1 Jac. 2, c. 17. It was holden by Lord Hardwicke, C., that for this reason the latter statute must be construed as if the former had been therein recited.

Barn. Chan. Rep. 276, Wallis v. Hodson.

A question arising, whether justices of the peace had a power to appoint five overseers for the parish of St. Chad's in Shrewsbury? it was holden, that they had not: and by Lord Mansfield, C. J., the number of overseers was, by the 39 Eliz. c. 3, to be precisely four. As this number might in some places have been found too large, power is given by the 43 Eliz. c. 2, of appointing four, three, or two, respect being had to the greatness of the parish; but no power is given to exceed, in any place, the number of four. The rule of law as to a special authority is, that every thing done under the colour thereof which is not within it is void. There was no need to insert negative words in either of the statutes: nay, since no power had been ever given to appoint five overseers, it would have been quite nugatory to have said that five shall not be appointed. As the 39 Eliz. was undoubtedly under the consideration of the legislature when the 43 Eliz. was made, it ought, although long since expired, to be taken into consideration in construing the latter statute; for it is a rule in the construction of statutes, that all which relate to the same subject, notwithstanding some of them may be expired or are not referred to, must be taken to be one system, and construed consistently; and the practice has been so to do in cases of bankruptcy, church leases, and in other cases.

MS. Rep. Rex v. Loxdale and others, Hil. 30 G. 2; {1 Burr. 447. So, though repealed, 3 Mass. T. Rep. 21, 22.}

||If it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.

Morris v. Mellin, 6 Barn. & C. 454; and see 7 Barn. & C. 99.||

4. *The Common Law ought to be regarded in the Construction of a Statute.*

If a statute make use of a word the meaning of which is well known at the common law, the word shall be understood in the same sense it was understood at the common law.

6 Mod. 143, Smith v. Harman.

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To know what the common law was before the making of a statute, whereby it may be known whether the statute be introductory of a new law or only affirmatory of the common law, is the very lock and key to set open the windows of a statute.

Plow. 365, Zouch v. Stowell; 2 Inst. 301, 308; 3 Rep. 13; Hob. 83, 97.

In order to construe a statute truly, four things are necessary to be understood and considered. 1. What the common law was before. 2. What the mischief was for which the common law had not provided. 3. The remedy that is by the statute provided for the mischief. 4. The true reason of the remedy.

3 Rep. 7, Heydon's case; 1 Inst. 272; 2 Inst. 301.

The best construction of a statute is to construe it as near to the rule and reason of the common law as may be, and by the course which that observes in other cases.

1 P. Wms. 252; Miles v. Williams, Plow. 365; 2 Inst. 148, 301; 1 Saund. 240. 10 Mod. 245.

By the statute *de donis* it is enacted that a fine levied of entailed lands *ipso jure sit nullus*: yet the construction has been, that such fine shall not be a nullity, and only a discontinuance; because at the common law, if a bishop seised in the right of his church, or a husband in the right of his wife, had aliened by a fine, it was but a discontinuance.

3 Rep. 83, the Case of Fines, Hob. 97.

When the provision of a statute is general, it is subject to the control and order of the common law.

1 Show. 455, Rex v. The Bishop of London; Sav. 39; Hard. 62.

{It is a safe rule of construction, that statutes made in imitation of the common law, shall be expounded according to the rules of law in like cases.

Foster, 94.

When a statute directs any thing to be done *generally*, and does not appoint any special manner, it shall be done according to the course of the common law.

Saville, 39.

Acts of parliament, in what they are silent, are best expounded according to the use and reason of the common law.

1 Str. 45, Rex v. Simpson.}

[In all doubtful matters, and where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature: for statutes are not presumed to make any alteration in the common law, farther or otherwise than the act expressly declares; therefore, in all general matters, the law presumes the act did not intend to make any alteration; for if the parliament had had that design, they would have expressed it in the act.

11 Mod. 150.]

If a new remedy be given by a statute in a particular case, this shall not be extended to alter the common law in any other than that case. [Or, as it seems better expressed by my Lord Vaughan, When a statute alters the common law, the meaning shall not be restrained beyond the words, except in cases of public utility, when the end of the act appears to be larger than the enacting words.

11 Rep. 59, Forster's case; Hob. 298; Cart. 36; Vaugh. 179.]

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The statute of 1 Westm. c. 20, *de malefactoribus in parcis et vivariis*, shall not extend to *forests*; because it is in restraint of the common law, and such statute is to be construed strictly.

Bro. *Parl.* pl. 72; 2 Inst. 455; Vaugh. 179.

An obscure statute ought to be construed according to the rules of the common law.

Win. 86, Hickford v. Machin. ¶ In Dr. Bonham's case, Lord Coke lays it down that the common law will sometimes control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant or impossible to be performed, the common law will control it, and adjudge such act to be void, and he cites several instances. 8 Coke, 118 a, (ed. 1826), and see per Holt, C. J., 12 Mod. 669, and note (C), 8 Coke, 118 a, (ed. 1826); Steward v. Lawton, 1 Bing. 374.¶

5. *The Intention of the Makers of a Statute ought to be regarded in the Construction of the Statute.*

Such construction ought to be put upon a statute, as may best answer the intention which the makers had in view; for, *qui hæret in literâ, hæret in cortice*.

Plow. 232, William v. Barkley, 11 Rep. 73. β When the intention of the legislature is doubtful, the court will interpret the law to be what is consonant with equity, and the least inconvenient. Kerlin v. Bull, 1 Dall. 178. See Crocker v. Crane, 21 Wend. 211; Griswold v. National Ins. Co., 3 Cowen, 89; 15 Johns. 380; Snyder v. Warren, 2 Cowen, 518, People v. the Utica Ins. Co., 15 Johns. R. 358.

The intention of the makers of a statute is at sometimes to be collected from the cause or necessity of making a statute; at other times from other circumstances. Whenever this can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute.

Plow. 205, Stradling v. Morgan; Lit. Rep. 212; 11 Mod. 161; 1 Show. 491; 1 Johns. 105.

Great regard ought, in construing a statute, to be paid to the construction, which the sages of law, who lived about the time or soon after it was made, put upon it; because they were best able to judge of the intention of the makers. It is moreover a maxim, that *contemporanea expositio est fortissima in lege*.

2 Inst. 11, 136, 181. {Vide 2 Mass. T. Rep. 475, Rogers v. Goodwin; 1 Cran. 299, Stuart v. Laird.} β When discovered, the intention of the legislature must prevail; any rule of construction, declared by previous acts, to the contrary notwithstanding. Brown v. Barry, 3 Dall. 365; Wilkinson v. Leland, 2 Pet. 662; M'Dermut v. Lorrillard, 1 Edw. R. 273; Gore v. Brazier, 3 Mass. 523, 540; Pease v. Whitney, 5 Mass. 380; Stanwood v. Peirce, 7 Mass. 458; Gibson v. Jenny, 15 Mass. 205. Opinion of the Justices, 22 Pick. 571; Kilby Bank Petitioners, 23 Pick. 93; Pearce v. Atwood, 13 Mass. 324; Richards v. Daggett, 4 Mass. 534.γ

β The construction given to an act of the legislature soon after its passage, cannot be altered at a very distant period.

Graham's Appeal, 1 Dall. 136.

When the words of a statute are doubtful, general usage may serve to explain them.

Curry v. Page, 2 Leigh, 617.δ

Wherever any words of a statute are obscure or doubtful, the intention of the legislators is to be resorted to, in order to find the meaning of the words.

Plow. 57, Wimbish v. Tailboys. {“When the words of an act,” says Lord C. J.

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Willes, "are doubtful and uncertain, it is proper to inquire what was the intent of the legislature; but it is very dangerous for judges to launch out too far in searching into the intent of the legislature, when they have expressed themselves in plain and clear words." Willes, 397. And see a similar opinion of Judge Chase, 4 Dall. 30, n.}

A thing which is within the intention of the makers of a statute, is as much within the statute as if it were within the letter.

Plow. 366; Zouch v. Stowell, 10 Rep. 101. § When the intention of the lawgiver is once ascertained, it is to prevail over the literal sense of the words. M'Dermut v. Lorrillard, 1 Edw. 273. §

By the 4 H. 7, c. 24, it is provided, that the right of a person, who was within the age of twenty-one years at the time of levying a fine, shall not be thereby bound: yet, if the disseisee die leaving a wife with child, and the disseisor levy a fine, and afterwards the child be born, the child, although not within the letter of the statute, (because, as the age of a child begins only from its birth, it cannot be said to have been at the time the fine was levied within the age of twenty-one years,) is within the meaning; and his right shall be saved.

Plow. 366, Zouch v. Stowell.

The words of 2 Westm. 2, c. 23, are, *in casu quando vir amisit per defaultam tenementum quod fuit jus uxoris suæ, durum fuit quod uxor post mortem viri sui non habuit aliud recuperare quam per breve de recto, propter quod dominus rex statuit, quod mulier post mortem viri sui habeat recuperare per breve de ingressu, cui ipsa in vitâ suâ contradicere non potest.* Only a loss by default of the husband is within the letter of the statute; but the construction has been, that a woman shall have a writ of *cui in vitâ*, although the loss was by default of both herself and husband; because, as she is presumed to have acted under the coercion of her husband, this case is within the intention of the makers of the statute.

Plow. 57, Wimbish v. Tailboys.

A thing which is within the letter of a statute is not within the statute, unless it be within the intention of the makers.

The statute of Marlebridge, c. 4, prohibits generally *the driving of a distress taken in one county into another.* It has, however, been adjudged, that if land holden of a manor in one county lie in another county, the lord may distrain upon the land, and drive the distress into the county where the manor lies; for as it would be inconvenient and a great loss to the lord, if he could not drive the distress to his manor, this case, although within the letter, is not within the meaning of the statute.

Plow. 18, Reniger v. Fogassa.

By the statute of Gloucester, c. 1, it is provided, "That the disseisee shall recover damages, in a writ of entry founded upon a disseisin, against him who becomes tenant after the disseisor." Yet, if the disseisor make a feoffment by deed to three persons, and make livery of seisin to two of them, but the third was not present at the livery, nor ever agreed to the feoffment, nor received any of the profits, he shall not, although he become, by the death of the other two, tenant after the disseisor, be liable to answer in damages to the disseisee: for the legislators could not intend to make him, who never assented to the wrong due to the disseisee, answerable for it.

Plow. 205, Stradling v. Morgan.

[Where it is manifestly the intention of the legislature, that a subsequent

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act of parliament shall not control the provisions of a former act, the subsequent act shall not have such operation, even though the words of it, taken strictly and grammatically, would repeal the former act.

Thus, in Bro. tit. *Parliament*, 52, "Where a statute is, that the merchant shall import bullion of two marks for every sack of wool exported; and then another statute was made, that the merchant should not be charged except for the ancient custom, this does not repeal the first statute." Vide *causam*, 4 E. 4, 12. And the reason is, that it clearly was not the intent of the legislature that it should have that effect.

Again, houses built on lands embanked from the Thames, in pursuance of 7 Geo. 3, c. 37, which vests those lands in the owners free from taxes, were holden not to be liable to be assessed to the general land-tax imposed by 27 Geo. 3; for though (strictly speaking) the land-tax is an annual statute, and the words of the land-tax act, which was passed in the 27th year of Geo. 3, are general and sufficiently large to subject these lands to the payment of the tax in question; yet, as the land tax is one of the ways and means for raising the supplies every year, and is now become part of the constant resources of the country, the legislature, in passing the 27 G. 3, could not intend to repeal the provisions of 7 Geo. 3, which exempted these lands from the land-tax.

Williams v. Pritchard, 4 Term R. 2.]

6. In what Cases a Statute ought to have an equitable Construction.

By an equitable construction, a case not within the letter of a statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. The reason for such construction is, that the law-maker could not set down every case in express terms.(a)

6 B. & C. 475; 1 Inst. 24. [(a) As to this doctrine of extending statutes by their equity, see Litt. § 21; Plowden, 9, 10, 17, 18, 36; 46, 53, 57, 59, 82, 88, 109, 124, 177, 204, 244, 363, 364, 366, 371, 464, 466; Vin. Abr. tit. *Statute*, (E); 6 Hatt. Treat. on Stat.; Ash. Expos. of Stat.; Com. Dig. *Parliament*, (R) 10, 13. It was observed by Richardson, (*arguendo*), 4 Maul. & S. 118, that such construction by equity might well obtain formerly when the legislature was used to express its intention sparingly in a few words or sentences only; but in modern times, since it was the practice to express the intention fully and at large, such construction was unnecessary and dangerous. And Lord Tenterden in a late case said, "There was always danger in giving effect to what is called the equity of a statute." 6 Barn. & C. 475; and the court there refused so to extend the 8 Ann. c. 14, § 1; and see *antè*, tit. *Rent*, note, vol. viii. p. 479.]

In order to form a right judgment, whether a case be within the equity of a statute, it is a good way to suppose the lawmaker present; and that you have asked him this question, Did you intend to comprehend this case? Then you must give yourself such answer, as you imagine he, being an upright and reasonable man, would have given. If this be, that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for while you do no more than he would have done, you do not act contrary to the statute, but in conformity thereto.

Plow. 467, Eyston v. Studd. [So the great master of Ethics—*ἴταν οὐκ ἔστι μὴ ὁ νόμος καθολικὸς, συμμῆ δ' ἐπὶ τοῦτοις παρὰ τὸ καθολικόν, τότε ὀρθῶς εἶχεν, ἢ παρελάττει ὁ νομοθέτης, ἢ ἡμάρταν ἀπλὰς ἔπειτα, ἐπαρρηθῆναι τὸ ἀληθὲς, ὃ καὶ ὁ νομοθέτης οὕτως αὐτοὶ, οὐκ ἔπαρταν, καὶ ἡ καὶ, ἐννοεῖται αὐτῷ. Arist. Ethic. ad Nicom. lib. 5, c. 10.]*

In some cases the letter of an act of parliament is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter.

That equitable construction, which restrains the letter of a statute, is de-

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finied by Aristotle in this manner :—*Æquitas est correctio legis generatim latae quâ parte defecit* ; or, as the passage is explained by Peronius, *Æquitas est correctio quædam legi adhibita, qui ab ea abest aliquid propter generalem sine exceptione comprehensionem.*(a)

Plow. 465, Eyston v. Studd. [(a) If the original had been correctly stated, the introduction of the gloss would not have been necessary. We transcribe the passage :—*Και ἢν αὐτὴ ἡ φύσις τῶν στατικῶν, στατικὸν τῶν νόμων, ἢ ἀλλοτρίῳ διὰ τὸ καθόλου.* Arist. Ethic. ad Nicom. lib. 5, c. 10.]

The words of 2 Westm. c. 11, are general, that all bailiffs and receivers, who in passing their accounts before auditors assigned shall be found in arrear, may be committed to the next jail : yet, if an infant bailiff or receiver be found in arrear, he shall not be committed ; for he is not by reason of his want of discretion within the equity of the statute.

Plow. 365, Zouch v. Stowell.

If a law be made, that whoever does a certain act shall be adjudged a felon and suffer death ; yet, if a madman do this, he shall be excused : for, as the action is not to be imputed to him, but to an involuntary ignorance brought upon him by the hand of God, he is not within the reason of the law.

Plow. 465, Eyston v. Studd.

But, if a felonious act be done by a drunken person, it is felony ; and, although he did not, when drunk, know what he did, he shall, because he brought the ignorance upon himself, suffer death. He does indeed deserve to be doubly punished ; for he has been guilty of two offences, the setting of an ill example to others in being drunk, and the doing of a thing which the law prohibited.

Plow. 19, Reniger v. Fogassa.

Actions which proceed from involuntary ignorance, are in legal phrase said to have been done *ex ignorantia* ; (b) actions which proceed from ignorance that might have been avoided, are said to have been done *ignorantèr*.

Ibid. [*Ἐτερον δὲ καὶ τὸ δι' ἀγνοίαν πράττειν, τοῦ ἀγνοῦντα πῶς.* Arist. Ethic. ad Nicom. lib. 3, c. 1.] ||(b) Where a prisoner was indicted for maliciously shooting A B on the high seas, and the offence was within a few weeks of the passing of the 39 Geo. 3, c. 37, (which enabled the trying the prisoner on land,) and before he could have had knowledge of the passing the act, the judges thought that as he could not have been tried but for that act, and as he could not have known of it, he ought to be pardoned. *Rex v. Bailey*, Russ. & Ry. C. Ca. 1.||

That equitable construction, which enlarges the letter of a statute, is thus defined :—*Æquitas est verborum legis directio efficiens, cum una res solummodo legis cavetur verbis, ut omnis alia in æquali genere eisdem caveatur verbis.*

Plow. 467, Eyston v. Studd.

The words of the 13 E. 1, are, *Circumspecte agatis de negotiis tangentibus episcopum Norwicensem* ; yet this statute, although only the bishop of Norwich be named, has been always extended by an equitable construction to other bishops.

Plow. 36, Platt v. The Sheriff of London.

The remedy given by the 9 E. 3, c. 3, against executors, has been always extended by an equitable construction to administrators ; because these are within the equity of the statute.

Plow. 467, Eyston v. Studd.

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A statute ought sometimes to have such equitable construction as is contrary to the letter.

Plow. 109, *Fulmerston v. Steward*, 3 Rep. 7; Hob. 346.

By the 1 E. 2, st. 2, the breaking of a prison by a prisoner confined for felony is made felony: yet, if a prison be on fire, and a prisoner break it in order to save his life, he shall be excused, notwithstanding the excusing of him be directly contrary to the letter of the statute.

Plow. 13, *Reniger v. Fogassa*.

By 2 Westm. c. 12, the party acquitted upon an appeal may recover damages against all who have been abettors of the appeal: yet if a son abet his mother in bringing an appeal, he shall not, although he act contrary to the letter of the statute, be liable to damages; for the common law and reason both say, that it is the duty of a son to aid and abet his mother.

Plow. 88, *Straunge v. Croker*; 2 Inst. 84.

[If a deed respecting lands situate in any of those counties where the legislature have required registration, is not registered, and afterwards the same lands are sold or mortgaged by a deed properly registered; if the person claiming under the second deed has *notice* of the first deed, the person claiming under the first deed, though it is not registered, shall be preferred to him; for though the register act vests the legal estate according to the prior registry, yet it is left open to all equity: and there is no danger to the subsequent purchaser, who might refuse, if he had notice of the prior conveyance. And a similar construction has prevailed upon the statute of enrolments, 27 H. 8, c. 16. And so on the statute of frauds, 29 Car. 2, c. 3, the courts have decided, that as it was made with a design to prevent, either in marriage or any other treaties, uncertainty, perjury, and contrariety of evidence, the cases not liable to these inconveniences are not within it.

Le Neve v. Le Neve, 1 Ves. 64; 1 Eq. Ca. Abr. 19.]

A statute, which is to take away a remedy given by the common law, ought never to have an equitable construction.

10 Mod. 282, *Hammond v. Webb*.

If the words of a statute do not extend to a mischief which rarely happens, they shall not be extended by an equitable construction to that mischief; but the case is to be considered as a *casus omissus*: for the objects of statutes are mischiefs *quæ frequentius accidunt*. [But it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom.]

Vaugh. 373, *Bole v. Horton*.

A statute shall never have an equitable construction, in order to overthrow an estate.

3 Leon. 133, *Wroth v. The Countess of Sussex*.

The sense of words used in an explanatory statute ought not to be extended by an equitable construction; but their meaning, the explanatory statute being a legislative construction of the words used in a former statute, ought to be strictly adhered to.

Carth. 396; *Inhabitants of Dalbury v. Foston*, Salk. 534. [But this rule that the statutes of explanation shall always be taken literally, is denied by Lord Hobart, in 2 Roll. Rep. 500, 501; *Winch*, 123; *Sir Wm. Jon.* 39; for no statute law, he says,

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should exclude all equity. And in 3 Co. 75 a, it is said in argument, and seems admitted by the court, that statutes of explanation are always interpreted beneficially.]

7. *A Statute which concerns the public Good ought to be construed liberally.*

The crown is bound by the general words of a statute made for the maintenance of religion, the advancement of learning, or the support of the poor; because all statutes in which the public are interested ought to be so construed that they may be effectual.

11 Rep. 71, Magdalen College's case; Stra. 517, 518, 519; Parker, 4. [The general rule is, that the king's rights shall not be barred or restrained, unless he be specially named. The instances mentioned in the text, which are adduced as exceptions to it, open a very uncertain latitude. "In such cases," saith a very sensible writer, "I presume, he may be precluded of such inferior claims as might belong indifferently to the king or to a subject, as the title to an advowson or a landed estate, but not stripped of any part of his ancient prerogative, nor of those rights which are incommunicable, and are appropriated to him as essential to his regal capacity." 1 Wooddes. 31, 32; Parker, 180.] || Attorn.-Gen. v. Newman, 1 Price R. 438.||

Every word in an act of general pardon shall be taken most strongly against the king.

Kielw. 198, pl. 1.

A statute made *pro bono publico* shall be construed in such manner that it may as far as possible attain the end proposed.

Str. 253, 258, Pierce v. Hopper.

The New River water act was holden, although only the city of London be therein mentioned, to extend to places adjacent; because all statutes made for the conveniency of the public ought to have a liberal construction.

2 Vern. 431, New River Company v. Graves.

It has been holden, that a statute discharging insolvent debtors ought to be construed strictly, because it gives away the property of some subject; and by Holt, C. J.—Let the statute be ever so charitable, if it give away the property of a subject, it ought to be construed strictly.

12 Mod. 513, Calladay v. Pilkington.

§ When a case is manifestly out of the mischief intended to be guarded against, or out of the spirit of the law, the letter of the statute will not be deemed so unequivocal as absolutely to exclude another construction.

Faw v. Marsteller, 2 Cranch, 10. §

8. *A remedial Statute ought to be construed liberally.*

Such construction ought to be put upon a remedial statute as will tend to suppress the mischief intended to be remedied.

3 Inst. 381, b. || See 2 Younge & J. 196. || § Drayton v. Grimke, 2 Bail. Eq. R. 392; Blake v. Hayward, 2 Bail. Eq. R. 208. See Vanhook v. Whitlock, 2 Edw. 304. §

A statute made for the suppression of a fraud, or to give a more speedy remedy for a right, ought to be construed liberally; because such construction is for the furtherance of justice.

Plow. 57, Wimbish v. Tailboys.

It is the duty of judges to put such construction upon a statute as may redress the mischief; guard against all subtle inventions and evasions for the continuance of the mischief *pro privato commodo*; and give life and

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strength to the remedy *pro bono publico*, according to the true intent of the makers of the law.

3 Rep. 7, Heydon's case; 1 Rep. 123; 11 Rep. 71; Cro. Car. 533; §3 Dow's Rep. 15.¶

A fine levied by a husband seised in the right of his wife is within the letter of the statute of Gloucester; but as the heir would be thereby barred of the inheritance of his mother by the warranty of his father, although no assets did descend upon him, the construction, in order to prevent this mischief, has been, that such fine does not bind the heir, unless assets did descend upon him.

1 Inst. 381.

By the 13 Eliz. c. 10, it is enacted, "That from henceforth all leases, gifts, grants, feoffments, conveyances, or estates to be made, had, done, or suffered by any master and fellows of a college, to any person or persons, bodies politic or corporate, other than for the term of twenty-one years, or three lives, shall be utterly void and of none effect, to all intents, constructions, and purposes." After the making of this statute, the master and fellows of Magdalen College granted certain premises by indenture to the queen, her heirs and successors for ever, with condition that she should, before a day mentioned in the indenture, convey and assure the same, by letters patent under the great seal, to Benedict Spinola, a merchant of Genoa. The question was, whether the grant to the queen were good? or, in other words, whether the queen were bound by the general words of the statute? It was holden, that where the crown has by prerogative any estate, right, title, or interest, this is not barred by the general words of a statute; but that, in this case, as the queen would not be deprived of any estate, right, title, or interest which she had in the premises before the making of the statute, she is bound thereby; and that such construction is necessary, for the preventing of subtle inventions and evasions, by which this act, made for the maintenance of religion and the advancement of arts and sciences, might be eluded.

11 Rep. 74, 75, Magdalen College's case.

β In construing a remedial statute, the enacting words may be extended beyond their natural import and effect, in order to include cases within the same mischief.

St. Peter's, York, (Dean and Chapter) v. Middleborough, 2 Yo. & Jerv. 196.γ

9. *A penal Statute ought to be construed strictly.*

The rules of the common law will not suffer the general words of a statute to be restrained, to the prejudice of a person upon whom a penalty is inflicted; but there are a multitude of cases to show, that the general words of a statute ought to be restrained in favour of such person.

Plow. 17; Reniger v. Fogassa, Bro. Parl. pl. 13. β The United States v. Wilson, Baldw. 78; The United States v. Twenty coils of cordage, 1 Baldw. 505, 508.γ

Wherever a greater punishment is inflicted by a statute for a second offence, an offender is not liable thereto, unless there has been judgment against him for a former offence; for a penal statute ought to be construed strictly, and it does not appear, that he has been guilty of a former offence, unless there has been such judgment.

2 Inst. 468; {1 Cain. 37, the People v. Youngs.}

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The statute which gives an action of attain in a plea real, being a penal statute, has never been extended to a plea personal.

Bro. *Parl.* 20.

It was in one case holden, that statutes which give costs are to be construed strictly; costs being a kind of penalty.

Salk. 205, *Cone v. Bowles*.

And in another case, wherein the authority of the last-mentioned case was recognised, it was said by Lord Hardwicke, C. J., to be a settled rule, that statutes which give costs are to be construed strictly.

Rep. in time of Hard. 357, *Rex v. Inhabitants of Glastonry*.

However true it may in the general be, that penal laws are to be construed strictly, yet, even in the construction of these, the intention of the legislators ought to be regarded.

3 Rep. 7, *Heydon's case*; 8 Mod. 65; ||2 *Atkins*, 205.||

||Buller, J., said, "It is not true that the court, in the exposition of penal statutes, are to narrow the construction. We are to look to the words in the first instance, and where they are plain we are to decide on them. If they are doubtful, we are then to have recourse to the subject-matter; but at all events it is only a secondary rule."

1 Term R. 101.

But the court cannot extend a penal law to other cases than those intended by the legislature, though they may think they come within the mischief intended to be remedied. Therefore a curate of a curacy, augmented by Queen Anne's bounty, not falling within the words "spiritual person beneficed with any parsonage or vicarage," in the residence act, 21 Hen. 8, c. 13, § 6, was held not liable to the penalties of non-residence under that statute.

Jenkinson v. Thomas, 4 Term R. 665. β In the construction of a penal statute, a misdemeanor shall not be considered as made felony, but by express words or necessary implication. *Eager v. The Commonwealth*, 4 Mass. 182. See *Melody v. Real*, 4 Mass. 472.γ

So also where a party was brought up as a felon convict under the smuggling act, 19 Geo. 2, for not surrendering himself in compliance with an order in council for him to surrender on a charge of being armed on the sea coast, &c.; and it was objected, that the statute required the sheriff to proclaim the order in two market towns *near* the place where the offence was committed, and it was proclaimed at towns forty-two, thirty, and six miles distant, when there were towns only six, eight, and fourteen miles distant; the court held the objection good, since it was a penal statute, and to be construed strictly; and though *near* might not mean *next*, it must mean within a reasonable distance.

The King v. Harvey, 1 Wils. 164; 1 Black. 20.||

It is declared by the 25 E. 3, to be treason for a servant to kill his master. A question arising upon this statute, whether a servant who had killed his master's wife ought to have judgment to be drawn and hanged, or only to be hanged? it was holden by all the judges that this is treason, and the judgment was that he should be drawn and hanged: and by Cooke, J.—Notwithstanding that a statute, which increases a punishment beyond what it was at the common law, ought not to be extended by an equitable construction, yet the words of such statute ought to be construed according to the true intention of the makers of the statute.

Plow. 16, *Strange v. Croker*.

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The 7 H. 7, c. 1, and the 3 H. 8, c. 1, make the departure of a soldier from his captain without license felony. A question arising, whether the departure of a soldier without license from his conductor, to whom he was delivered to be brought to the sea-side, was felony? It was resolved by nine judges against three that it was felony; for that a conductor is a captain within the meaning of the statutes, and that a penal statute, when made for the public service, and good of the king and realm, ought to be construed according to the intention of the makers of the statute.

Cro. Car. 71, *The Soldiers' case*.

It was holden, that an offender who had been guilty of arson was not entitled to the benefit of clergy, notwithstanding this was not expressly taken from him by any statute; and it is added, that there are many cases in our books where penal statutes have been construed by intendment for the suppression of a mischief, the advancement of justice, and the putting of a stop to heinous offences.

11 Rep. 34, 35, *Poulter's case*.

A statute which is made for the good of the public ought, although it be penal, to receive an equitable construction.

2 Brown, 110, 111, 116. β A statute which is penal as to some persons, but beneficial generally, may be equitably construed. *Sickels v. Sharpe*, 13 Johns. 497. γ

A statute, which is penal to some persons, may, provided it be beneficial to all others, have an equitable construction; for every statute is penal to some persons: and if the extending of a penal statute by an equitable construction be more advantageous than prejudicial to the greater part of the people, it may, by the rules of law, be so extended.

Plow. 36, *Platt v. The Sheriff of London*; Plow. 59; 10 Mod. 117; 2 Brown, 302.

The statute of Marlebridge, c. 24, against committing waste, is penal; yet it has been construed liberally. The words of this statute are *firmarii non faciant vastum*: but it has been holden, that the word *firmarii* extends to strangers; it has likewise been holden, that this statute extends to waste *omittendo*, although the word *faciant* in the strict sense of it does only mean active waste.

10 Mod. 282, *Hammond v. Webb*.

||The stat. 8 Ann. c. 7, imposing a penalty of treble the value on the importation of foreign goods prohibited to be imported, is prospective in its operation, and extends to goods prohibited subsequently to the statute, as well as previously to it.

Attorney-general v. Saggors, 1 Price R. 182.||

It was insisted, that the statute against simony, being a penal law, ought to receive no aid from a court of equity: but by Wight, Lord Keeper—This court will aid remedial laws notwithstanding they are penal, not indeed so as to make them more penal, but to let them have their proper effect.

Prec. in Ch. 215, *Attorney-general v. Sudell*.

[Even statutes which take away clergy are, in some cases, to be taken by equity; and if a statute is made suppletory to the common law, and in a similar case, and takes away clergy, it must be construed liberally.

10 St. Tr. 436; *Jenk. Cent.* 97.]

{A penalty must be created by express words, and cannot be raised by implication.

2 Johns. Rep. 379, *Jones v. Estis*; 1 Mass. T. Rep. 167, *Berry v. Ripley*.}

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§ Laws are construed strictly to save a right, or to avoid a penalty.

Whitney v. Emmett, 1 Baldw. 316; Sprague v. Birdsall, 2 Cowen, 419; Gilbert v. Columbia Turnpike Company, 3 Johns. Cas. 107; Bennett v. Ward, 3 Caines, 259; Sickles v. Sharp, 13 Johns. 497; Jones v. Estis, 2 Johns. 370; Myers v. Foster, 6 Cowen, 567. g

10. *Some other Rules which ought to be observed in the Construction of a Statute.*

Such construction ought to be put upon a statute as does not suffer it to be eluded.

Hob. 97, Moore v. Hussey; 3 Rep. 7; 11 Rep. 73.

Every statute ought to be construed for the preventing of delay as much as possible.

2 Inst. 611, 614.

A statute ought to be so construed, that no man who is innocent be punished or endamaged.

1 Inst. 360.

No statute shall be construed in such manner as to be inconvenient or against reason.

Cart. 136, Hughes v. Hughes; 1 Inst. 97; 5 Rep., Cawdrie's case; § M'Dermut v. Lorrillard, 1 Edw. R. 273. g

{The provisions of any statute ought to receive such a reasonable construction, if the words and subject-matter will admit of it, as that the existing rights of the public, or of individuals, be not infringed.

2 Mass. T. Rep. 146, Wales v. Stetson.}

§ When the construction of a statute is doubtful, an argument from inconvenience will have weight, but not otherwise.

Langdon v. Potter, 3 Mass. 215; Gore v. Grazier, 3 Mass. 523; Ayres v. Knox, 7 Mass. 306; Putnam v. Longley, 11 Pick. 487; Pitman v. Flint, 10 Pick. 504. g

By the 12 Car. 2, c. 17, all persons presented to benefices in the late times, who should conform as in the statute was directed, were to be confirmed therein, *notwithstanding any act or thing whatsoever*, yet it was holden, that the statute did not extend to the confirming of a person, who had been simoniacally promoted.

Sid. 232, Crawley v. Phillips.

If the meaning of a statute be doubtful, the consequences are to be considered in the construction: but, where the meaning is plain, no consequences are to be regarded in the construction; for this would be assuming a legislative authority.

10 Mod. 344, The Queen v. Simpson.

If a statute be penned in dubious terms, usage is a just rule to construe it by; for *jus et norma loquendi* is governed by usage, and the meaning of words spoken or written ought to be allowed to be as it has constantly been taken to be: but if the usage have been to construe the words of a statute contrary to their obvious meaning, such usage is not to be regarded; it being rather an oppression of those concerned than a construction of the statute.

Vaugh. 169, 170, Shepherd v. Gosneld; [Parker, 44; 1 Term R. 728.] {Vide 2 Mass. T. Rep. 475, Rogers v. Goodwin; 1 Cran. 299, Stuart v. Laird.}

A statute which gives a new remedy ought not to have a liberal construction.

2 Sid. 63, Pool v. Neel.

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A statute creating a new jurisdiction ought to be construed strictly.

Stra. 258, 260, *Pierce v. Hopper*; 10 *Rep.* 73.

{Statutes authorizing summary convictions are always strictly construed; and that mode of proceeding is not adopted but where the language of the law is positive and unequivocal.

3 *Cain.* 259, *Bennet v. Ward.*}

It has been holden, that the 6 G. 1, c. 21, which gives the commissioners of excise a jurisdiction to condemn in a summary way certain goods therein mentioned, ought to be construed strictly; because it breaks in upon the ancient jurisdiction of the Court of Exchequer.

Bunb. 106, *Warwick v. White.*

A private statute ought not to have a liberal construction.

2 *Mod.* 57, *Threadneedle v. Lynam.*

β The presumption is always in favour of the validity of a law, unless the contrary be clearly demonstrated.

Cooper v. Telfair, 4 *Dall.* 14.

When a case depends on the statutes of a state, the settled construction of those statutes by the state courts will be regarded by the Supreme Court of the United States.

Polk's lessee v. Wendal, 9 *Cranch*, 87. See *Catheart v. Robinson*, 5 *Pet.* 264.

When English statutes, for example the statute of frauds and the statute of limitations, have been adopted into our legislation, the known and settled construction of such statutes by the English courts of law has been considered as silently incorporated into those acts.

Dialogue v. Pennock, 2 *Pet.* 18; *Kirkpatrick v. Gibson's executors*, 2 *Brocken*, 388.

A private statute which grants exclusive privileges in derogation of the common law rights of the citizens at large, ought not to be extended by implication, on the contrary it should be construed strictly against the company.

Cayuga Bridge Co. v. Magee, 2 *Paige*, 116; *Culver v. Hayden*, 1 *Verm.* 359.

Statutes intended to deprive creditors of all remedy for the recovery of their debts should be construed strictly.

Salters v. Tobias, 3 *Paige*, 338.

An explanatory statute should be construed strictly and literally.

Kenton v. M'Connell, *Hughes*, R. 150.

When a statute is revised, and some parts are omitted, such omissions are not to be revived by construction, but they are to be considered as annulled.

Ellis v. Paige, 1 *Pick.* 43.

Statutes made in derogation of the common law are to be construed strictly.

Melody v. Real, 4 *Mass.* 471; *Gibson v. Jenney*, 15 *Mass.* 205; *Commonwealth v. Knapp*, 9 *Pick.* 496; *Wilbur v. Crane*, 13 *Pick.* 284.

Statutes in derogation of private rights are to be construed strictly; as, for example, when a statute disables a person of full age and of sound mind to make a contract.

Smith v. Spooner, 3 *Pick.* 229.

A statute which imposes restrictions upon trade, or which levies a tax upon them, must be construed strictly.

Sewall v. Jones, 9 *Pick.* 412.

Negative words will make a statute imperative; words in the affirmative are directory only.

Rex v. Leicester, (*Justices*), 7 *Barn. & Cress.* 12.

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11. *Of Conflicting Statutes.*

When the Constitution and an ordinary act of legislation conflict, the former must govern.

Marbury v. Madison, 1 Cranch, 137; *Vanhorn's Lessee v. Dorrance*, 2 Dall. 304; *Briscoe v. The Bank of the Commonwealth*, 11 Pet. 257; *Bennett v. Boggs*, 1 Baldw. 74; 6 Cranch, 87; 2 Pet. 522; 3 Dall. 399; 14 Dall. 4; 2 Dall. 309; 12 Wheat. 270; 1 Binn. 415; 5 Binn. 355; 1 Cowen, 550; 7 Pick. 466; 13 Pick. 60; 11 Mass. 396; 9 Greenl. 60; Charl. 175, 235; 1 Breese, 70, 209; 1 Blackf. 206; 2 Porter, 303; 19 Johns. 58; 2 Penns. 184; 1 Marsh. 290; 2 Litt. 90; 4 Monr. 43; 1 South. 192; 5 Hayw. 271; 1 Harr. & Johns. 236; 1 Gill & Johns. 473; 7 Gill & Johns. 7; 9 Yerg. 490; 1 Rep. Const. Court, 267; 3 Desaus. 476; 6 Rand. 245; 1 Chap. 237, 257; 1 Aik. 314; 3 N. H. Rep. 473; 4 N. H. Rep. 16; 7 N. H. Rep. 65; 1 Murph. 58; 7 Pick. 466; 13 Pick. 60; 2 Fairf. 118; 9 Greenl. 140; 6 Greenl. 112; 3 Greenl. 326; 3 Verm. 507; 3 S. & R. 169; 4 Greenl. 140.

An act of Congress ought never to be construed to violate the law of nations, if any other possible construction remain.

Murray v. The Charming Betsey, 2 Cranch, 64.

In construing the statutes of a state, the Supreme Court of the United States will be guided by the settled construction of such statute by the courts of that state.

M'Keen v. Delaney's Lessee, 5 Cranch, 22; *Elmendorf v. Taylor*, 10 Wheat. 152; *Ship v. Miller's heirs*, 2 Wheat. 316; *Johnson v. Chew*, 12 Wheat. 153; *Society for the Propagation of the Gospel, &c., v. Wheeler*, 2 Gallis. 105; *Shelby v. Guy*, 11 Wheat. 361; *Thatcher v. Powell*, 6 Wheat. 119; *Gardner v. Collins*, 2 Peters, 58; *Preston v. Browder*, 1 Wheat. 115; *M'Cluney v. Silliman*, 3 Peters, 277; *United States v. Wonson*, 1 Gallis. 5; *Campbell v. Claudius*, Pet. C. C. R. 484; *United States v. Morrison*, 4 Pet. 127; *Henderson v. Griffin*, 5 Pet. 151; *Lessee of Levy v. M'Cartee*, 6 Pet. 102; *Green v. Neal*, 6 Pet. 291.

When a contract is made in a particular state, or with a view to its laws, and it is discharged under a law of that state, to which no constitutional objection exists, such law will be regarded as a rule of decision by the federal courts, as well as that under which it was created.

Golden v. Prince, 3 Wash. C. C. R. 313.

Subsequent laws do not operate a repeal of former laws by containing different provisions; to produce that effect the provisions of the two laws must be incompatible.

Herman v. Sprigg, 3 Mart. Rep. N. S. 190; *D'Armas' case*, 10 Mart. R. 172; *Bernard v. Vignaud*, 10 Mart. 560.

In conditional obligations, the law in force when the contract was entered into, not that at the time the condition takes place, governs the rights of the parties.

Town v. Syndics of Morgan, 2 Lo. R. 113; *Rowlet v. Shepherd*, 4 Lo. R. 94.

The capacity of heirs to inherit depends on the law in force when the succession was opened.

Lange v. Richoux, 6 Lo. R. 569.

Where a law was passed allowing interest at the rate of eight *per centum* on promissory notes; held, that it did not apply to notes executed before its passage, although not paid, and some of them not due, at the time of its passage.

White v. M'Quillan, 12 Lo. R. 530; 9 Lo. R. 145.

Contracts must be enforced according to the law of the country where they are made.

Saul v. His Creditors, 5 Mart. R. N. S. 585; *Bell v. James*, 6 Mart. R. N. S. 76;

(K) How Guilt of Disobedience to a Statute punished.

King v. Harman's heirs, 6 Mart. R. N. S. 676; Shiff v. Louisiana State Insurance Co., 6 Mart. R. N. S. 631; Morris v. Eves, 11 Mart. R. 730; Evans v. Gray, 12 Mart. R. 475; Brown v. Richardson, 1 Mart. R. N. S. 202; Baldwin v. Gray, 4 Mart. R. N. S. 192.

When a contract is made between persons absent from each other, the contract is considered consummated in, and is to be governed by the laws of the country where the final assent was given.

Whitson v. Stodder, 8 Mart. R. 135.

In a contract of affreightment, the laws of the place whence the goods are to be brought, not those of the place to which they are to be carried, will govern.

Hampton v. Brig Thaddeus, 4 Mart. R. 584.

Parties are always presumed to contract in relation to their own laws, unless the contrary be shown.

Shiff v. Louisiana State Ins. Co., 6 Mart. R. N. S. 633.

When a contract is entered into in one place, to be executed in another, there are two *loci contractus*; the *locus celebrati contractus*, and the *locus solutionis*; the former governs every thing which relates to the mode of construing the contract, the meaning to be attached to the expressions, and the nature and validity of the engagement; but the latter governs the performance of the contract.

Dufau v. Humphreys, 8 Mart. R. N. S. 34.

The *lex fori* must govern the contract in relation to the remedy.

Lynch v. Postlethwaite, 7 Mart. R. 213; Union Cotton Man. Co. v. Lobdell, 7 Mart. R. N. S. 108; Ohio Insurance Company v. Edmondson, 5 Louis. R. 300.

The courts of one state have power to decide on the validity of legislative acts of another state, with respect to the Constitution of the United States, when the question arises in a case within their jurisdiction.

Stoddart v. Smith, 5 Binn. 355; 8 Pick. 194. But see Kean v. Rice, 12 S. & R. 203.

The Supreme Court of the United States has no authority, on a writ of error from a state court, to declare a state law void because there is a collision between such law and the state constitution.

Jackson v. Lamphire, 3 Pet. 289; 3 Dall. 392; 4 Gill & Johns. 519; 1 Ham. 236.

(K) How a Person guilty of Disobedience to a Statute may be punished.

WHEN a statute giveth a forfeiture or penalty against him who wrongfully detaineth or dispossesseth another of his duty or interest, he that hath the wrong shall have the forfeiture or penalty, and shall have an action therefore upon the statute at the common law; for the king shall not have the forfeiture in such case; and so it was adjudged in the exchequer upon conference with the other judges, in an information for the treble value for not having set out tithes at Iclington in the county of Cambridge.

1 Inst. 159; 3 Lev. 290.

As every statute made against an injury, mischief, or grievance, does impliedly give a remedy; the party injured, if no remedy be expressly given, may have an action upon the statute.

2 Inst. 55, 74; 10 Rep. 75.

If a statute command or prohibit a thing for the advantage of a particular person, that person shall have an action upon the statute, to recover satis-

(K) How Guilt of Disobedience to a Statute punished.

faction for an injury done him contrary thereto; for it would be strange that there should in such case be no remedy except in a court of equity.

6 Mod. 26, Anon.

If a penalty be given by a statute, but no action for the recovery thereof be given, an action of debt will lie for the penalty.

Poph. 175, Welden v. Vesey.

If a thing be prohibited by a statute under a certain penalty, and the penalty, or any part of it, be given to him who will sue for the same, any person may bring an action or information for the penalty.

2 And. 127, 128; Agard v. Tandish, 2 Hawk. c. 26, § 17.

If the penalty given by a statute is to be recovered in a court of record, this can only be recovered in one of the superior courts at Westminster; for being a penal law it ought to be construed strictly, and these are the courts in which the king's attorney-general is supposed to attend.

Salk. 178, Walwyn v. Smith.

If an action upon a statute giving a penalty be brought against several defendants, only one penalty can be recovered.

Cro. Eliz. 480, Partridge v. Naylor.

But, if a conviction be upon a statute giving a forfeiture, each defendant must pay the forfeiture: for the forfeiture in such case is not in the nature of a satisfaction to the party injured, but a punishment of the offender; and although debts be joint, crimes are several.

Salk. 182, The Queen v. King.

When a statute commands or prohibits a thing of public concern, the person guilty of disobedience to the statutes, besides being answerable in an action to the party injured, is likewise liable to be indicted for the disobedience.

Cro. Eliz. 635, Croucher's case; 2 Inst. 131, 163; 1 Hawk. c. 22, § 5.

If the thing commanded or prohibited by a statute can only be prejudicial to one or two persons, as, if it be to repair the bank of a river, for want of having done which the ground of a certain person has been overflowed, no indictment lies; the remedy being by an action upon the case.

2 Sid. 209, Rex v. Pawlyn.

If a statute, although it extend to all persons, chiefly concern disputes of a private nature, as those relating to distresses between lords and tenants, an offence against the statute is not indictable.

1 Mod. 71, Rex v. Leginham, Ibid. 288.

If a statute inflict a new punishment upon the person guilty of an offence, before punishable at the common law, the offence is still punishable as it was before the making of the statute. The crime of forgery, notwithstanding the 5 Eliz., is at this day punishable in the same manner as it was at the common law.

Fitzg. 66, Rex v. Woolston, 10 Mod. 337.

An indictment against a person for having acted as a justice of peace, whereas he had not lands to the value of 40*l.* per annum, was holden to be bad; because this is a new offence, and the method of recovering the penalty given is prescribed in the statute; and by the court—Where a statute creating a new offence gives a penalty, and directs how it shall be recovered, the offence cannot be punished in any other way than that directed by the statute.

Cro. Ja. 643, Castle's case; Mich. 21 Jac. 1.

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Since this case, it has been holden, that if the thing commanded or prohibited by a statute be of public concern, an offender against the statute may be indicted, although the offence be a newly created one, and the method directed for recovering the penalty given be not indictment; for that the giving of other affirmative remedies shall not, unless these words, *and not otherwise*, are added, take away the general way of proceeding which the law has appointed for the offence.

1 Mod. 34, Crofton's case, Hil. 21 Car. 2; 1 Vent. 63, S. C.

The former, however, seems to be the better opinion; for it is laid down in divers books, that if a statute creating a new offence appoint a particular method of proceeding against the offender, as by commitment or information, without mentioning an indictment, no indictment lies; because, as other methods of proceeding are expressly mentioned, that by indictment seems to be excluded by implication.

2 Hawk. c. 25, § 4; Show. 398, 399; Fitzg. 47.

In a modern case the doctrine of the last-mentioned books is recognised; and by Lord Mansfield, C. J., Crofton's case has been often denied to be law.

1 Burr. 545, Rex v. Wright. [See too Rex v. Pensax, 1 Barnard. B. R. 127; Rex v. Robinson, 2 Burr. 803; Rex v. Boyall, Ibid. 834.]

[Where a new offence is created by a statute, and a penalty annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause by indictment, on the ground of its being a misdemeanor.

Rex v. Harris, 4 Term R. 202.]

It has been holden, that if a statute creating a new offence and inflicting a penalty, provide, that the penalty may be recovered by action, bill, plaint, information, or *otherwise*, an indictment will lie upon the statute.

2 Hawk. c. 25, § 4.

By the 12 Geo. 1, c. 35, a penalty of 20s. per thousand is given for burning place-bricks and stock-bricks together; but there is no appropriation of the penalty, nor is any method of recovering it directed. Upon a demurrer to an indictment for this offence, the court held, that this, like every unappropriated penalty, is in the nature of a debt to the crown, and recoverable by action in a court of revenue; but that an indictment does not lie.

Stra. 828, Rex v. Malland.

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1. A public Statute.

A PUBLIC statute may be pleaded without reciting it; for the rule of law is, that the judges are *ex officio* bound to take notice of every public statute.

4 Rep. 76, Holland's case; Bro. Parl. pl. 69; 2 Roll. Abr. 465; Cro. Eliz. 601; Doct. pl. 337.

Upon this principle, that the judges are bound to take notice of every public statute, it is holden, that *nul tiel record* cannot be pleaded to a public statute: and by the court—God forbid, that if the record of a public statute should be lost or destroyed by fire, this should tend to the prejudice of the commonwealth. In such case, the judges may, from some printed

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copy, or from some record in which it has been pleaded, or in some other way, inform themselves of the contents of the lost or destroyed statute.

8 Rep. 28, *The Prince's case*; Cro. Car. 355; ||15 East, 322.||

If part of a statute be public, and the residue thereof private, there is no necessity that the part which is public should be recited in pleading.

10 Rep. 57, *The Chancellor of Oxford's case*; Hob. 227; Sid. 24.

||By the statute of 41 Geo. 3, c. 90, § 9, copies of the statutes of Great Britain and Ireland, prior to the union, printed by the printer duly authorized, shall be received (mutually) as conclusive evidence of the several statutes in the courts of either kingdom.||

2. *A private Statute.*

If a private statute be pleaded, it must be recited; for, unless this be done, the judges cannot take notice of any thing therein contained.

4 Rep. 76, *Holland's case*; 2 Roll. Abr. 466; 2 Mod. 57; Doct. pl. 33. β See *Catlin v. Johnson*, 8 Johns. 520.γ

It is in the general true, that if a private statute be pleaded, *nul tiel record* may be replied: but, if the exemplification of a private statute under the great seal be pleaded, *nul tiel record* cannot be replied.

H. H. C. L. 16; 8 Rep. 28, *The Prince's case*.

3. *Some general Rules for pleading a Statute.*

In pleading a statute, it is not necessary to recite the title; because this is no part of the statute.

Ld. Raym. 77, *Chance v. Adams*.

In pleading a statute, it is not necessary that the preamble should be recited; for this, although it usually contain the motives of making it, is no part of the statute.

6 Mod. 62; *Mills v. Wilkins*, 8 Mod. 144.

If a statute make certain circumstances necessary to the validity of an act, which was valid at the common law without such circumstances, this does not alter the manner of pleading, which was used before the making of the statute.

12 Mod. 540, *Birch v. Bellamy*.

A tenant for years cannot, since the 29 Car. 2, c. 3, assign over his term without doing it in writing; but, as he might have done this by parol at the common law, an assignment may be pleaded without alleging it to have been in writing; and it may be given in evidence that it was in writing.

12 Mod. 540, *Birch v. Bellamy*.

Where the power to do an act was originally granted by a statute, it must be shown in pleading the statute that the act was done according to the direction of that statute, and of every subsequent statute relative to the subject.

12 Mod. 540, *Birch v. Bellamy*.

If a will of lands be pleaded, it must be shown, that the will is in writing, as by the 32 H. 8, c. 1, by which power to make such will was first given, is directed: and it must be likewise shown, that the requisites made necessary to the validity of such will by the 29 Car. 2, c. 3, have been complied with.

12 Mod. 540, *Birch v. Bellamy*.

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When a temporary statute, which has expired, is continued by a subsequent statute, it is sufficient to plead the former, without taking any notice of the latter.

Stra. 1066, *Rex v. Morgan*.

If one statute have prohibited the doing of an act, and another be afterwards made, which inflicts a forfeiture on the person who shall do the act, the person who sues for the forfeiture must plead both statutes.

Plow. 206, *Stradling v. Morgan*.

Exception was taken to a replication, that only part of a statute therein pleaded was recited, and it was insisted, that the whole statute ought to have been recited; but the whole court agreed, that the replication was good; for that no person is obliged to recite in pleading any more of a statute than the clause which makes for himself.

Plow. 106, *Fulmerstone v. Steward*; Plow. 65, 410; Cro. Ja. 140; 2 Jo. 50.

But, if there be in the same clause of an act of parliament, which is pleaded, any proviso or exception, this must be recited, although it should make against the party reciting it; for, as the proviso or exception is parcel of the clause which is pleaded, if this should be omitted, it would amount to a misrecital of the clause.

Plow. 410, *Newys v. Lark*; Bro. *Plead.* pl. 164; Ld. Raym. 120. [Vide *Spieres v. Parker*, 1 Term R. 141; *Rex v. Hall*, Ibid. 322.] {Also 3 Cain. 137, *Blasdel v. Hewitt*; 3 Johns. Rep. 41, *Donelly v. Vandenberg*; Ibid. 438, *Bennet v. Hurd*; 4 Johns. Rep. 304, *Teal v. Yelles & Fonda*; 1 Saun. 262, note (1) by Serj. Williams; 1 Str. 555, *Rex v. Ford*; } ||*Gill v. Scriven*, 7 Term R. 27; *Jelfs v. Ballard*, 1 Bos. & Pul. 468.||

||But a proviso forming a distinct sentence need not be stated, although it is included in the same section with the clause pleaded.

Steel v. Smith, 1 Barn. & A. 94.||

If one party have only pleaded such part of a statute as it was for his interest to plead, the other party may plead any other part of the statute.

Cro. Ja. 144; *Read v. Potter*, Ld. Raym. 120.

If in pleading a statute it be said, that the parliament at which the statute was made continued *usque ad* a certain day, the words *usque ad* in this case include the day to which they relate; for it is usual to say, that a parliament continued *usque ad* a certain day, *quo die* it was prorogued; but in all other cases the day to which they relate is excluded by the words *usque ad*.

Ld. Raym. 210, *Birt v. Rothwell*.

4. Some Rules for pleading a Statute, which relate to particular Parts of the Pleadings.

If a statute give a new action, the statute must be recited in the writ.

2 Inst. 121; Bro. *Act. sur le Stat.* pl. 47; Bro. *Parl.* pl. 75.

But if a statute giving a new action ascertain the form of a writ to be used, as is done by the statute giving a *formedon in descender* and by other statutes, it is not necessary to recite the statute in the writ; for the writ itself is in such case in the words of the statute.

Bro. *Act. sur le Stat.* pl. 47; Bro. *Parl.*

If an action which lay at the common law be given by a statute in a new case, the statute by which it is given need not be recited in the writ.

Bro. *Act. sur le Stat.* pl. 47; Bro. *Parl.*

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If an action of trespass be brought by an executor *de bonis asportatis in vita testatoris*, there is no necessity that the writ should recite the statute by which the action is given; because an action of trespass lay at the common law in other cases.

Bro. *Act. sur le Stat.* pl. 47; Bro. *Parl.*

If a statute in any case direct what shall be pleaded, the plea must be in the words of the statute.

11 Mod. 207, Hall v. Holliday.

5. Of Misrecital in pleading a Statute.

If one party in pleading a statute misrecite the matter, year, day, or place, the other party may demur generally, there being no such statute; for he who takes upon him to recite a statute must do it truly.

Bro. *Parl.* pl. 87; Cro. Ja. 211; 2 Hawk. c. 25, § 104. β A statute passed in a session of parliament begun in the second, and continued in the third year of the king's reign, must not be pleaded as passed in the second and third years of the reign, although such act be recited in a later statute as "passed in the second and third years," &c. Rex v. Biers, 3 Nev. & M. 475; 1 Adol. & Ellis, 327.γ

If a party recite a statute as made upon a certain day, which was not made on that day, he has, although the statute be a public statute, failed; for he does not refer to the knowledge of the judges, as he would have done if he had said against the form of the statute in such case provided. If he had said so, the law would have referred the pleading to such statute as had been apt for it; but as he has recited a particular statute, if there be not such statute, his pleading is grounded upon a thing which does not exist.

Plow. 79, 84, Partridge v. Strange; Bro. *Parl.* 87.

The 32 H. 8, c. 9, was recited to have been made at a parliament holden the 28th of April, in the thirty-second year of the reign of Henry the Eighth, whereas in truth the parliament began the twenty-eighth day of April, in the thirty-first year of that prince's reign, and was continued by prorogation to the time of making this act. It was insisted that the misrecital was fatal; but it was holden that it was not; and by Hales, J.—Every meeting of a parliament, after a prorogation, is a new session, and a statute can never relate further back than to the first day of the session in which it was made.

Plow. 79, Partridge v. Strange.

||The session called 29 Eliz., really commenced 28 Eliz., 29th October; then the parliament was adjourned till the 29th November, and then adjourned by the queen's commissioners to the 15th February following; therefore the correct way of stating the statute 29 Eliz. c. 4, as to extortion by bailiffs, is as being made at a parliament which commenced the 29th October, in the 28th year, &c., and where it was stated as of the 29th year in the declaration, the judgment was arrested; for till the day of passing acts was stated in the margin, they had reference to the first day of the session.

Savage v. Smith, Black. R. 1101; Rumsey v. Tuffnell, 2 Bing. 257.||

In an action of debt upon the statute of E. 6, for not having set out tithes, the plaintiff declared, that whereas the fourth day of November, in the second year of the reign of Edward the Sixth, it was enacted. It was said, in arrest of judgment, that there is no such statute; because the parliament

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began in the first year of that prince's reign, and was continued by prorogation to the time of making this statute: but by the court—There are a thousand precedents to the contrary, and as the constant usage has been to recite this statute as the plaintiff has done, we will not depart from that usage, the doing of which would disturb a great number of judgments.

Yelv. 126, 127; *Oliver v. Collins*, 2 Mod. 241; *Skin.* 110, 111; *Cro. Ja.* 111.

The safest way of pleading a statute, is to say that it was made at a parliament holden upon a certain day of a certain year of a certain king's reign, without taking any notice of the commencement of the parliament: for the judges are bound to take notice of the commencement of every parliament, and likewise of its prorogations and sessions.

Ld. Raym. 210, *Birt v. Mason*; 1 Lev. 296; Ld. Raym. 343; *Lutw.* 140.

In pleading a private statute, there was a misrecital of the day of the commencement of the parliament in which it was made. This was holden to be fatal, upon a general demurrer; for, although the judges cannot, *ex officio*, take notice of the contents of a private statute, they are bound to take notice of the commencement of a parliament.

Mo. 551, the Bishop of Norwich's case; Ld. Raym. 210, 343; 1 Lev. 296; [Doug. 97, *notis.* So, where a private statute was described in the declaration to be made in the fourth year of Philip and Mary, whereas the record, when produced in evidence, appeared to be in the *fourth and fifth* of Philip and Mary, the variance was holden to be fatal, and the plaintiff was nonsuited. *Rann v. Green*, Cowp. 474.] ||See 2 Bing. 257.||

If a statute is recited to have been made at a parliament holden upon a day to which the parliament was adjourned, this is such a misrecital as is fatal: for, as an adjournment of a parliament does not put an end to a session, the meeting after the adjournment is only a continuance of the session.

12 Mod. 602, *Anon.*; 2 Mod. 242; Ld. Raym. 343.

It is said that a misrecital of the day of making an act of parliament, which would have been fatal in a declaration, is not so in a plea in bar.

1 Brownl. 196, *Woolsey v. Shepherd*.

Repugnancy in reciting the day of making a statute is fatal; as, if it be said that a statute was made on a certain day in the first and second year of the reign of a certain king; it being impossible that the same day should be in two different years.

Mo. 302, *Langly v. Haynes*; 2 Hawk. c. 25, § 104.

A statute was alleged to have been made upon the 12th day of November, in the sixth year of the reign of William the Third, whereas Queen Mary being at that time alive, it should have been in the sixth year of the reign of William and Mary. For this misrecital judgment was arrested.

Ld. Raym. 1224, *Anon.*

It has been holden, that as the title of a statute is no part of the statute, a misrecital of this is not fatal.

Ld. Raym. 77, *Chance v. Adams*, Pasch. 8 W. 3.

This case, which was in the Court of Common Pleas, appears to have been determined upon the authority of one in the time of Hale, C. B., which had been determined in the same way.

Hardr. 324, the Attorney-general *v. Hutchison*, Pasch. 15, c. 2. {See 3 Cain. 38, 41, *Murray v. Fitzpatrick.*}

But in a later case it was holden, that a misrecital of the title of a

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statute is fatal: and by Holt, C. J.—It is very true, that the title of an act of parliament is no more a part of the law than a title of a book is a part of the book; and there is, for that reason, no necessity to recite it: but, if a party do take upon him to recite the title of a statute, he thereby ties himself up to an act so entitled, and if he cannot produce it he is gone. Notwithstanding my great veneration for him, I cannot agree with what is reported to have been said by Hale as to this point. Gould, J., agreed with the C. J. Powell, J., gave no opinion; but said, that he had concurred with the other judges of the Common Pleas, merely upon the authority of the opinion of Hale as reported in Hardres.

6 Mod. 62, Mills v. Wilkins, Mich. 2 Ann.

A public statute need not be recited in pleading;{} but, if a party take upon him to recite a public statute, and misrecite it, the misrecital is fatal.

Cro. Eliz. 236, Vanderplanhen v. Griffith; Cro. Car. 232; 2 Mod. 99. {} Willes, 210. But the party must state enough to bring his case within it. Ibid.}

If, after pleading a public statute, the conclusion be, *contra formam statuti in hujusmodi casu editi*, a misrecital is not fatal; for as it was not necessary to recite the statute, the judges, although it be misrecited, will take notice of the true contents. But, if after pleading a public statute, the conclusion be, *contra formam statuti prædicti* or *vigore statuti prædicti*, a misrecital is fatal; for, by the conclusion, the pleading is tied up to the misrecited statute.

Ld. Raym. 382, Platt v. Hill; Plow. 79, 84; Cro. Car. 233; Freem. 311, ||(2d ed.)||

A misrecital of a public statute is so fatal, that the court, well knowing there is no such statute, cannot, even if both parties should consent, give judgment.

Cro. Eliz. 245, Love v. Wotton; [Dougl. 97, Boyce v. Whitaker.]

A private statute being misrecited in pleading, the plaintiff demurred: but did not show the misrecital for cause. The court doubted, whether, in the case of a private statute, they could, from a printed copy, or from the record, or in any other way, take notice that the statute was not as the defendant had recited it; and the case was adjourned.

Sid. 356, Hil. 19 Car. 2, Holby v. Bray.

It has been since holden, that although a private statute be misrecited in pleading, the court must take it to be as recited, unless it is denied to be so by pleading *nul tiel record*; or shown to be otherwise, by alleging how it ought to have been recited.

Ld. Raym. 382, Mich. 10 W. 3, Platt v. Hill; 2 Mod. 241.

Every misrecital of a statute in a material part is fatal.

Cro. Car. 136, 522; Ld. Raym. 382; 2 Mod. 98.

The words of the 8 H. 6, c. 9, are, *if it be found by verdict, or in any other manner by due form of law, that the party, &c.* In reciting this statute, the words, *or in any other manner*, were omitted. The misrecital was holden to be fatal; because the sense of the statute is thereby altered, it being tied up to a recovery by verdict only: but it was said, that if the misrecital had been of a part not material, the misrecital would not have been fatal.

Cro. Eliz. 186, Farr v. East; Ld. Raym. 382.

By the 8 Eliz. c. 2, § 3, it is enacted, That *if any person shall cause any other person to be arrested to answer in any court where any liberty or privi-*

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lege is used to hold plea in any action or actions personal. In reciting this statute, the word *personal* was omitted. The misrecital was holden to be fatal; because the statute was recited as extending to all actions, whereas it did in truth extend only to personal actions.

Cro. Eliz. 263, *Vanderplanhen v. Griffith*; Cro. Car. 136.

A misrecital of a statute in an immaterial part is not fatal.

Cro. Car. 136, 522; Ld. Raym. 382; 2 Mod. 98; {3 Cain. 38, 41, *Murray v. Fitzpatrick*.} [But *qu.* if it be set out unnecessarily, for in that case the materiality of the misrecited part seems not to be considerable; the court will hold the party to half a letter. Dougl. 97, and vide *Mills v. Wilkins*, *supra*.]

In an action of false imprisonment, the defendant justified under the 1 M. c. 3, which statute was recited in these words, *if any person shall maliciously and contemptuously molest.* It was upon a general demurrer insisted, that the words of the act are in the disjunctive *maliciously* or *contemptuously*: but by the court—Where the word which precedes and the word which follows are of the same import, the disjunctive *or* means the same as the copulative *and*: but if the two words are of different import, as *by word* or *deed*, it is otherwise. Another part of this act was thus recited, *by the said justices, or by the better part of them.* To this recital it was objected, that the words are *by the said justices, or by the more part of them*: but the objection was overruled.

Godb. 246, *Crosse v. Stanhope*; 2 Bulst. 47, 48, 49.

The words of the statute of Winchester are, *forasmuch as from day to day, robberies, murders, burnings, and theft, be more often used.* In an action upon this statute, brought by a person who had been robbed, the recital was in these words, *forasmuch as from day to day, robberies, murders, burning of houses, and theft, be more often used*: But as the plaintiff's case was founded upon a robbery, the court were unanimously of opinion that the misrecital was not fatal.

2 Mod. 99; 2 Jon. 51.

A misrecital of a public statute is not cured by a verdict: nor can the court, who are bound to take notice of the contents of every public statute, give judgment; because they know the statute to be otherwise.

Cro. Eliz. 245, *Love v. Wotton*.

It is laid down, that a misrecital of a public statute, in a part which does not go to the grounds of the action, is after a verdict cured by the statute of jeofails.

Styles, Boomer v. Cleve. {See 3 Cain. 38, 41, *Murray v. Fitzpatrick*.}

A misrecital of a private statute is cured by a verdict: for advantage should have been taken of the misrecital, by pleading *nul tiel record*, or by showing the statute to be otherwise.

Ld. Raym. 382, *Platt v. Hill*; 2 Mod. 241.

6. Of Surplusage in pleading a Statute.

An act of parliament for the restitution of an heir after the attainder of his ancestor for treason, enabled the heir to enter. He did enter, and brought a *scire facias* against *J N quare terra resummi non debet, et liberari querenti.* The word *resummi* was not in the act: yet the better opinion was, that the surplusage, although in a judicial writ, was not fatal.

Bro. Nug. & Surpl. pl. 8.

SUMMONS AND SEVERANCE.

THIS title is distinguished in the books by the name of *Summons and Severance*: but the proper name of it is *Severance*; for the summons is nothing more than a process, which must, in certain cases, issue before judgment of severance can be given.

It will here be proper to show,

- (A) The Necessity of Judgment of Severance in some Cases.
 - (B) By whom Judgment of Severance may be given.
 - (C) Where a Summons must issue before Judgment of Severance can be given.
 - (D) At what Time Judgment of Severance must be prayed in a Writ of Error.
 - (E) Who may pray Judgment of Severance.
 - (F) In what Actions Judgment of Severance may be given.
 - (G) Where the Writ abates notwithstanding there is Judgment of Severance.
 - (H) The Consequence of Judgment of Severance to the Party severed.
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(A) The Necessity of Judgment of Severance in some Cases.

It is a rule of law, that if two or more have a joint right to a thing, they must join in an action for the recovery thereof.

Joint-tenants must implead jointly; for they claim under one title.

1 Inst. 180.

Parceners, who make but one heir, must, in order to recover the possession of their ancestor, join in one præcipe.

1 Inst. 163, 164.

Executors, because the right of their testator devolves on all of them, must join in an action for the recovery of any thing due to their testator.

Godolph. Orph. Leg. 134; Salk. 3; Carth. 61.

If two or more persons who have a joint right of action, have not all joined in an action which is brought, the defendant may plead in abatement; for if any one could recover in such case singly, every other might; the consequence of which would be, that the defendant would be liable to answer in divers actions for the same matter.

Cro. Eliz. 554, Deering v. Moor; 9 Rep. 37; Salk. 3, 32; 2 Lev. 113; 3 Lev. 354; 1 Mod. 102.

It is indeed in the power of one or more of the persons, who have a joint right of action, to commence a suit in the name of all in whom the right is: but, notwithstanding a plea in abatement would be thereby prevented, it would still be in the power of any one of them, by neglecting to appear, or by refusing to proceed afterwards in the suit, to render it fruitless.

1 Inst. 139; Bro. *Summ. and Sev.* pl. 17,

For if an action be brought in the name of two or more, and one make default, the nonsuit of him is the nonsuit of all.

Bro. *Summ. and Sev.* pl. 2, pl. 5, pl. 7.

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(D) At what time Judgment of Severance must be prayed in a Writ of Error.

So, if a writ of error be brought in the name of two or more, the assignment of error cannot be by one without the other or others.

Cro. Eliz. 892, *Andrews v. Ld. Cromwell*.

To prevent the inconvenience and the failure of justice, which would be, if all the other persons having a joint right of action should be precluded by the negligence or collusion of one from having the effect of a suit, the law has provided, that if one of the persons, in whose name a joint action is commenced, do not appear, or do after appearance make default, the other or others may have judgment *ad sequendum solum*, or in other words judgment of severance.

Hard. 318, *Manley v. Lovell*; Bro. *Summ. and Sev.* pl. 4, pl. 16.

If two bring an assize, and one come not at the day, a summons *ad sequendum simul* may issue; and if the party summoned do not appear at the return of the summons, the other party may pray judgment *ad sequendum solum*.

Bro. *Summ. and Sev.* pl. 4, pl. 18.

If eight have joined in an assize, and five of them are nonsuited, or will not sue, judgment of severance may be had against the five.

Bro. *Summ. and Sev.* pl. 16.

If in a writ of *quo jure* by two, one make default, judgment of severance may be had by the other; in which case the nonsuit of the one shall not be nonsuit of the other.

Fitz. N. B. 128; 1 Inst. 139.

After judgment of severance against one or more of the plaintiffs in an action, the other plaintiff or plaintiffs may proceed in the suit.

(B) By whom Judgment of Severance may be given.

JUSTICES of *nisi prius* have no power to give judgment of severance; for such judgment can only be given by the justices of the court in which the record is.

Bro. *Summ. and Sev.* pl. 10; 2 Roll. Abr. 489.

(C) Where a Summons must issue, before Judgment of Severance can be given.

If two or more are joint plaintiffs in an action in which there may be judgment of severance, and one of them has not appeared, he must be summoned before judgment of severance can be given against him; because a writ may have been purchased in a person's name without his privity.

1 Inst. 139; Bro. *Summ. and Sev.* pl. 10; 2 Roll. Abr. 488.

But, if two or more joint plaintiffs in an action have both appeared, and afterwards one make default, the court may, without a previous summons, give judgment of severance against him.

Bro. *Summ. and Sev.* pl. 10; 10 Rep. 135; Hard. 317.

(D) At what time Judgment of Severance must be prayed in a Writ of Error.

JUDGMENT of severance cannot be given in a writ of error, unless it be prayed before the defendant has pleaded in *nullo est erratum*.

Cro. Ja. 117, *Blunt v. Snedstone*.

But such judgment may be given after a joinder in the assignment of error.

2 Lilly Pr. Reg. 663.

(E) Who may pray Judgment of Severance.

If two of four joint-tenants disseise the other two, the two, who are disseised, may bring an assize in the name of the four, and may have judgment of severance against the two disseisors.

Bro. *Summ. and Sev.* pl. 17.

Judgment of severance may be prayed by one joint-tenant against any other joint-tenant who has joined in an avowry.

5 Mod. 150, 151, Pullen v. Palmer.

But, where two joint-tenants, who had acknowledged a statute upon which their land was taken in execution, did afterwards join in bringing an *audita querela* upon the statute, it was holden, that judgment of severance could not be given; for the wrong done to one by taking the land in execution being no wrong to the other, they ought not to have joined, but each ought to have brought an *audita querela*.

Noy, 1, Farmer v. Downes.

One tenant in common cannot in the general pray judgment of severance; for, as the titles of tenants in common are distinct, they are not in the general obliged to join in an action; but one tenant in common may pray judgment of severance in an action of *quare impedit* for the recovery of an advowson; because, as an advowson is not divisible, tenants in common must join in that action,

2 Inst. 197; 5 Mod. 11.

If two or more parceners have joined in an action for recovering the estate of their ancestor, judgment of severance may be prayed, because they could not avoid joining in such action,

1 Inst. 164.

If a person having two daughters be disseised, and the daughters die leaving issue, any of their issue may pray judgment of severance; for, as a joint right descended upon them from their common ancestor, they must all join in a *præcipe*; and it makes no difference, whether the ancestor, seeing he was out of possession, died before the daughters or after; for in either case the issue must make themselves heirs to the person last seised,

1 Inst. 164.

But, if the two daughters had in this case been actually seised, and afterwards disseised, none of their issue could have prayed judgment of severance; because, as distinct estates descended from several ancestors, it was not necessary for the issue to join in a *præcipe*.

Bro. *Coparc.* pl. 2; 1 Inst. 164.

Judgment of severance may be prayed in an action of trespass by executors for an injury done to the goods of their testator; because, as in representing him they make but one person, they must all join in such action.

Godolph. Orph. Leg. 134; Carth. 61; Salk. 9, 9; 9 Rep. 37.

If two or more persons, who have joined in a writ of error, were under a necessity of joining therein, judgment of severance may be prayed.

6 Rep. 25, Ruddock's case; Cro Eliz. 892.

No judgment of severance can be prayed in a case wherein two or more persons, who might have brought separate actions, have joined in an action; for it was their folly so to do.

2 Roll. Abr. 488; 6 Rep. 25.

If four persons join in an action of *quare impedit* for the recovery of an

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(F) In what Actions Judgment of Severance may be given.

advowson, and one vary from the others in making title to the advowson, judgment of severance cannot be prayed, but the writ shall abate; for they ought not to have joined in the action, unless their title had been joint.

Bro. *Quar. Imped.* pl. 2.

A, B, and C, being jointly seised of certain premises, made a lease thereof to D for life; and afterwards B and C released to A. In an action of waste by A, the lease was pleaded by D in abatement; and it was insisted that B and C ought to have been joined in the action: but it was holden, that as the right of B and C was gone by the release, A might sue without them.

Bro. *Summ. and Sev.* pl. 6.

(F) In what Actions Judgment of Severance may be given.

JUDGMENT of severance may be given in an assize; in a writ of cosinage; in a writ of *quo jure*; and in all real actions.

1 Inst. 139; Bro. *Judg.* pl. 144; Keilw. 47.

Judgment of severance cannot be given in a writ of *quid juris clamat*; because the tenant shall not be compelled to attorn to one person.

10 Rep. 135, Read v. Redman.

Judgment of severance may be given in an action of detinue of charter; for this action standeth in the reality.

1 Inst. 286; Bro. *Chart. de Terre*, pl. 74.

But judgment of severance cannot be given in an action of champerty; because this action, as only damages can be recovered therein, is personal.

Bro. *Summ. and Sev.* pl. 20.

Judgment of severance may be given in all mixed actions.

Inst. 139; Bro. *Chart. de Terre*, pl. 74.

Judgment of severance may be given in an *ejectione firmæ*, because the land itself as well as damages may be recovered in the action.

Keilw. 47.

And for the same reason judgment of severance may be given in an action of waste.

Bro. *Summ. and Sev.* pl. 9; 2 Roll. Abr. 488.

It is in the general true that judgment of severance cannot be given in a personal action.

1 Inst. 139; Bro. *Chart. de Terre*, pl. 74; Bro. *Summ. and Sev.* pl. 8; Cart. 191.

If a trespass be committed upon the estate of two joint-tenants, they must join in an action; yet no judgment of severance can be given; for, as either might have released the damages, either may refuse to carry on a suit for the recovery of damages.

Gilb. Hist. C. P. 196, 197; Cro. Eliz. 649.

If an action of debt be brought by two obligees of a bond, judgment of severance, although they must join in the action, cannot be given; because either may discharge the debt: and the law does not provide for a case in which one man has by his own folly put himself into the power of another.

Gilb. Hist. C. P. 196, 197; Cro. Eliz. 649.

But judgment of severance may be given in a personal action brought by two or more executors; for although any one of them may give a re-

(F) In what Actions Judgment of Severance may be given.

lease, the release would be a *devastavit* in him; but, as the refusing to join in carrying on the suit is not a *devastavit*, if judgment of severance could not be given, any one of them may, by colluding with the debtor, prevent the recovery of a debt due to his testator, without being guilty of a *devastavit*.

Cart. 191, Rickfield v. Udall; Went. Off. of Exec. 96, 10.

If two executors, however, declare in an action of trover for a bond lost in the time of their testator, but lay the conversion after his death, judgment of severance cannot be given; because, as the conversion, which is the gist of this action, was in their own time, it is like an action of trespass upon their own possession in which judgment of severance cannot be given.

Hard. 317, Manley v. Lovell; 2 Roll. Abr. 488.

Judgment of severance may be given in an action of attain upon a real action; for wherever such judgment might have been given in the principal action, it may in an action of attain founded upon that action.

1 Inst. 139; Bro. Summ. and Sev. pl. 2, pl. 7.

Judgment of severance may be given in a suit upon a writ of error, or in a suit upon a *scire facias*, provided it might have been given in the original action; for these actions, although personal, shall follow the nature of the actions upon which they are founded.

1 Inst. 139; 6 Rep. 25; Cro. Eliz. 649.

Judgment of severance may sometimes be given in suit upon a writ of error, although it could not in the original action.

6 Rep. 25, Ruddock's case; Cro. Ja. 177, 616; Cro. Eliz. 649.

The distinction seems to be, that if any thing may be recovered by two or more plaintiffs in a writ of error, judgment of severance cannot be given; but where a writ of error is brought by two or more plaintiffs to discharge themselves from some burden, judgment of severance may be given.

10 Rep. 135; Read v. Redman, 6 Rep. 25; Cro. Eliz. 649; Cro. Ja. 117, 616.

If two plaintiffs in an action of debt are barred by an erroneous judgment, and costs are taxed against them, and they afterwards bring a writ of error to get rid of the costs, judgment of severance cannot be given; because, as either of them might before judgment have released the original action, it is now in the power of either of them to give a release of error, which shall bind the other.

Cro. Eliz. 649; Razing v. Ruddock, 6 Rep. 23; Cro. Ja. 117, 616.

But, if divers are defendants in an action, and judgment is against them, and they bring a writ of error to discharge themselves of the costs and damages of the action, judgment of severance may be given; for, although the costs and damages are a mere personal duty, it would be hard that a release of error by one, with whom the others are compelled to join in bringing a writ of error, should be prejudicial to the others, nay, this would put it into the power of a plaintiff to secure himself always against a writ of error, nothing more being necessary than to make some person, upon whom he can depend, to collude with him, a defendant in the action.

Cro. Ja. 616, Bythall v. Harris; 6 Rep. 25; 10 Rep. 135; Cro. Eliz. 649; Cro. Ja. 19, 117.

It has been holden, that if there be judgment of outlawry against two;

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(G) Where a Writ abates after Judgment of Severance.

a writ of error to reverse the judgment must be in the name of both ; that if only one appear, judgment of severance may be given against the other ; and that the judgment in the original action may in such case be reversed for the benefit of him who does appear.

Salk. 496, Symmons v. Bingoe.

This determination, if not mistaken by the reporter, seems to have been a hasty one ; for it is laid down, and in books of the best authority, that where four had joined in a writ of error to reverse a judgment of outlawry, and two of them had made default, judgment of severance could not be given ; because, as they might have had several writs of error, it was their folly to join in one writ.

6 Rep. 25, Ruddock's case ; Bro. Summ. and Sev. pl. 11.

Judgment of severance may be given in a suit upon a writ of *audita querela*, brought by two upon a judgment in a personal action : for, as the suit is by way of defence, it would be hard that the nonsuit of one should be the nonsuit of the other.

1 Inst. 139 ; Bro. Summ. and Sev. pl. 2 ; 6 Rep. 25 ; Cro. Eliz. 649 ; Cro. Ja. 616.

It is said, that judgment of severance may be given in an action upon the case, *quare exaltavit stagnum, per quod suum pratum fuit inundatum*.

Godb. 59, Gile's case.

(G) Where a Writ abates after Judgment of Severance.

If two joint-tenants join in a suit upon a writ of *scire facias*, and one die after judgment of severance, the suit does not abate ; because it is founded upon a judicial writ.

10 Rep. 134, Read v. Redman.

But, if two joint-tenants join in a real action, and one die after judgment of severance, the action does abate ; because it is founded upon an original writ.

Cro. Car. 574, Rex v. Dryden ; 10 Rep. 134 ; Cro. Ja. 19.

For the same reason, if two parceners join in a real action, and one of them die after judgment of severance, the action does abate.

10 Rep. 134, Read v. Redman ; Cro. Ja. 19 ; Cro. Car. 574.

The reason why an original writ abates in the two latter cases is, that the survivor, who upon the death of the other became entitled to the whole, may have an original writ to recover the whole : for if an original writ, which when it was sued out was proper, become afterwards untrue or unfit for the party's case, and he may have another original writ which agrees with the real truth of his case, the original writ does abate, notwithstanding the alteration was occasioned by the act of God ; because the law will not suffer a party to recover under an original writ, the words of which are false or unfit for his case.

11 Rep. 45, Godfrey's case ; 10 Rep. 134 ; 1 Saund. 285.

But, if an original writ become after judgment of severance untrue or unfit for the party's case by some act of his own, the writ does not *ipso facto* abate, it being only abateable ; because it would in such case, provided there had been no judgment of severance, have only been abateable.

10 Rep. 134, Read v. Redman.

If two parceners or two joint-tenants join in a writ *quare impedit*, for the recovery of an advowson, and one die after judgment of severance, the

(H) The Consequence of Judgment of Severance to the Party severed.

writ, notwithstanding it is an original writ, does not abate: because, as the advowson is not devisable, the party who proceeded in the suit would have recovered the whole if the other party had lived, and consequently no new right is acquired by his death.

1 Inst. 197, 286; 10 Rep. 134. [The reason here given does not appear in the books referred to, nor are all the references applicable even to the subject.]

If two persons join in a writ of error brought to reverse a judgment, and one die after judgment of severance, the writ, although it be an original writ, does not abate: because, as the design of the plaintiffs is only to discharge themselves of a judgment, the deceased party could not, although there had been no judgment of severance, have released the error.

10 Rep. 135, *Read v. Redman*; 6 Rep. 25; Cro. Eliz. 649; Cro. Ja. 117, 616.

The death of one of the plaintiffs after judgment of severance, in a suit upon a writ *audita querela*, does not abate the writ, although it be an original writ; because nothing can be recovered in the suit; the design thereof being only to get rid of a charge to which the plaintiffs are liable.

1 Inst. 133; Cro. Eliz. 448; Cro. Ja. 19; 6 Rep. 256; 10 Rep. 135.

If an action of debt be brought by two executors, and one die after judgment of severance, the writ does not abate; for the right of the survivor, who might, if the other had lived, have recovered the whole debt, is not thereby altered.

Cro. Eliz. 652, *Anon.*; 10 Rep. 135; Hard. 317; Went. Off. of Exec. 96, 104.

A writ does not abate after judgment of severance, because the party against whom judgment has been given was an alien; for advantage should have been taken of this in pleading.

Bro. *Brief*, 121.

(H) The Consequence of Judgment of Severance to the Party severed.

THE power, which a party against whom judgment of severance has been given, had over an action, is thereby so entirely at an end, that his name can never after be made use of in any of the proceedings.

Bro. *Proc.* pl. 12; 2 Roll. Abr. 489.

An action of debt had been brought by six executors, but there was afterwards judgment of severance against three of them; and final judgment was entered in the names of the three who had proceeded in the suit. It was assigned for error, that the other three, notwithstanding the judgment of severance, were still executors, and consequently, that they ought to have been named in the final judgment; but the court held, after ordering precedents to be searched, that the final judgment ought to be entered only in the names of the executors who had proceeded in the suit.

Cro. Car. 420; *Price v. Parkhurst*, 2 Roll. Abr. 98.

Two executors had joined in an action; but there was judgment of severance against one of them. The other proceeded to final judgment, and then died. As the survivor was no party to the final judgment, it was holden that he could not take out execution upon it.

Wentw. Off. of Exec. 104, 105; Dal. 51. pl. 17, 53, pl. 30.

One executor may, indeed, although judgment of severance be given against him, release the debt for which an action is brought in the name of him and another executor, at any time before final judgment; but this does not proceed from any power he has over the action, but from an interest which he still has in the debt. The presumption of law is, moreover,

(A) Of the different Kinds of *Supersedeas*.

that as he is liable to answer for the debt so released, it being a *devastavit*, his co-executor is not thereby injured.

Godolph. Orph. Leg. 134; Dal. 51, pl. 17, 53, pl. 30; Wentw. Off. of Exec. 104.

If a writ of partition be brought in the name of three parceners, and there be judgment of severance against one, that party shall, notwithstanding the judgment, have a third part of the estate; the design of the suit being to make partition of the estate.

Jenk. 211, pl. 46.

SUPERSEDEAS.

A SUPERSEDEAS, in the strict sense of the word, means the setting aside or annulling of an act.

But the word in its legal acceptation means the preventing as well as the setting aside or annulling of an act.

The matter which falls properly under this title shall be ranged in the following order:

- (A) Of the different Kinds of *Supersedeas*.
- (B) Who may award a writ of *Supersedeas*.
- (C) In what Cases a Writ of *Supersedeas* may be awarded.
- (D) Of certain Writs which are *Supersedeases* by Implication.
 - 1. *Of a Writ of Audita Querela.*
 - 2. *A Writ of second Deliverance.*
 - 3. *A Writ of Habeas Corpus ad faciendum et recipiendum.*
 - 4. *A Writ of Certiorari.*
 - 5. *A Writ of Error.*
- (E) Of Certain Requisites, which are necessary to the making of a Writ of Error a *Supersedeas*.
 - 1. *It must be allowed.*
 - 2. *Bail must be put in thereto.*
 - 3. *It must be proceeded in without Delay.*
- (F) To what Time a Writ of Error relates as a *Supersedeas*.
- (G) What the Effect of a *Supersedeas* is.
- (H) How Disobedience to a *Supersedeas* may be punished.

(A) Of the different Kinds of *Supersedeas*.

A SUPERSEDEAS is sometimes express, at other times it is implied.

An express *supersedeas* may be by writ, or without writ.

When it is by writ, the person to whom the writ is directed is commanded to forbear the doing of an act therein mentioned; or, if the act have already been done, to annul it as far as possible.

If an exigent have been awarded against a person, he may have a writ directed to the sheriff, commanding him, upon the person's finding sureties

(B) Who may award a Writ of *Supersedeas*.

to appear at the return of the exigent, that if he have not arrested him, he do not arrest him, but suffer him to go in peace ; and that if he have arrested him he discharge him.

Fitzh. N. B. 236.

Or the person against whom an exigent has been awarded may, upon finding sureties in a court which has power to award it, have a writ of *supersedeas*, directed to the sheriff, to the same effect.

Fitzh. N. B. 236.

An express *supersedeas* without writ is, where a person who has, pursuant to an authority in him vested, made an order for the doing of an act, does, by a second order, forbid the doing of the act.

If a justice of the peace have made an improper order, he may, upon finding that he has so done, by a second order supersede the former order.

Stra. 6, *The Inhabitants of Pancras v. The Inhabitants of Rumbald*.

But, if the act directed by the former order to be done were done before the delivery of the second order, it is doubtful whether this shall annul the act ; and it may perhaps be proper that only a writ of *supersedeas* should have a retrospective power.

Every writ is a *supersedeas* by implication, by which, although no writ of *supersedeas* have issued thereupon, the doing of an act is prevented.

But a writ which is only a *supersedeas* by implication cannot annul an act which was done before the writ issued.

(B) Who may award a Writ of *Supersedeas*.

A WRIT of *supersedeas* does not lie from any other court to the Court of Chancery ; but this court may award a writ of *supersedeas* to a writ from the same court.

If one person have sued out a writ of *supplicavit* from the Court of Chancery for arresting another to find sureties of the peace, the person against whom this writ is awarded may have a writ of *supersedeas* from the same court, commanding the sheriff to forbear to arrest him.

Fitzh. N. B. 238.

A writ of *supersedeas* may at any time be awarded from the Court of Chancery to any other court.

A *capias ad satisfaciendum* having issued from the Court of King's Bench, a writ of *supersedeas* was awarded by the Court of Chancery, commanding the justices of that court to surcease. This writ was by some thought to be contrary to the law ; but Finch, because it was out of a higher court, did surcease, and no further proceedings were had.

Bro. *Supers.* pl. 5.

If, after surety of the peace have been granted by the Court of King's Bench, a writ of *supersedeas* come from the Court of Chancery to the justices of that court, their power is at an end.

Bro. *Peace*, pl. 17.

Any court of record at Westminster may in term-time award a writ of *supersedeas*, to any writ or process which has issued from the same court ; or to the proceedings of any other court, in case the other court have proceeded in a matter properly conusable in the court from whence the writ of *supersedeas* is awarded.

(B) Who may award a Writ of *Supersedeas*.

If a *capias* or an exigent have been awarded against a person, he may in term-time have a writ of *supersedeas* out of the court which awarded it.

Fitzh. N. B. 236.

If after a person, who is sued in a court Christian, have obtained a writ of prohibition, the spiritual court proceed to excommunication, he may in term-time have a writ of *supersedeas* out of the court from which the writ of prohibition was awarded.

Bro. *Supers.* pl. 13; Fitzh. N. B. 239.

Heretofore a writ of *supersedeas* to a writ *de excommunicato capiendo* could only be had from the Court of Chancery, unless the court Christian had proceeded after the awarding of a writ of prohibition: but, as every writ *de excommunicato capiendo* must, pursuant to the 5 Eliz. c. 23, be entered of record in the Court of King's Bench before it be delivered to the sheriff, and must likewise be returned to that court, a writ of *supersedeas* may at this day be awarded by that court.

Salk. 293, Rex v. Fowler.

If an accountant of the Court of Exchequer be sued in the Court of Common Pleas, the Court of Exchequer may in term-time award a writ of *supersedeas* to the justices of the Court of Common Pleas, commanding them to surcease.

Bro. *Supers.* pl. 38.

The Court of Exchequer cannot award a writ of *supersedeas* to the justices of the Court of King's Bench; because the pleas in the latter court are before the king himself; but the record of the Court of Exchequer may be shown to the court, and if the person therein sued appear to be an accountant of the Court of Exchequer, the Court of King's Bench will dismiss the suit.(a)

Bro. *Supers.* pl. 38. [(a) The junior Baron used to carry the writ-book of the Exchequer to the Court of King's Bench, and show it to them, and there demand cognisance of the suit, in consequence of which the court surceased. But this practice, which arose from this odd technical reason, that the king cannot command himself, has fallen into disuse, as indeed has the practice of sending a *supersedeas* to the Court of Common Pleas; all actions in which the revenue is concerned, being removed as well out of the Courts of King's Bench and Common Pleas as out of every other court having jurisdiction, into the office of pleas of the Court of Exchequer, simply by an order of that court, which operates in the nature of an injunction. Anstr. 207, 208.]

If, after the plaintiff have recovered in an action of debt upon a bond in the Court of Common Pleas, the defendant bring a writ of error in the King's Bench, and the plaintiff, pending the writ, bring another action of debt upon the same bond in the Court of Common Pleas, this court cannot award a writ of *supersedeas* to the second action; but the Court of King's Bench may.

Bro. *Supers.* pl. 11.

By the 2 E. 3, c. 8, it is provided, "That it shall not be commanded by the great nor little seal to disturb or delay common right; and though such commandment do come, the justices shall not therefore surcease to do right in any point."

In an action of trespass there was judgment for the plaintiff, and a *capias* was awarded for the fine due to the king. And an exigent was afterwards awarded. Hereupon the defendant obtained a writ of a *supersedeas* under the privy seal, commanding the justices to surcease all process for the king. The writ of *supersedeas* was holden to be consistent with the 2 E. 3, c. 8,

(C) In what Cases a Writ of *Supersedeas* awarded.

for, although the fine arose upon the suit of the party, the king may at his pleasure, as the *capias* was not executed, put a stop to all proceedings for his fine, but, if a defendant have in such case been arrested upon the *capias*, the king shall not, unless the plaintiff be satisfied, set him at liberty; for the plaintiff may elect to have the *capias* for his execution.

Bro. *Supers.* pl. 26; Fitzh. N. B. 238.

An express *supersedeas* without writ can only be granted by the person or persons who did the act which was intended to be superseded.

Two justices of the peace may by a second order supersede a former order made by themselves.

Stra. 6, *The Inhabitants of Pancras v. The Inhabitants of Rumbald*.

But a court of quarter-sessions cannot by their order supersede an order made by two justices of the peace.

Salk. 472, *The Inhabitants of Oswell v. The Inhabitants of Woking*.

The same justices by whom restitution was awarded upon a conviction on an indictment for a forcible entry found before them, may, upon the insufficiency of the indictment appearing to them, supersede the award of restitution, in case it have not been executed.

1 Hawk. c. 64, § 61; Dyer, 187; H. H. P. C. 140.

And it is said that if the award of restitution were made by four or five justices, it may be superseded by any one or two of them.

Cro. Eliz. 915, *Fitzwilliam's case*.

But it seems to be agreed, that no other justice or justices of the peace, nor other court whatsoever, except the Court of King's Bench, have a power to supersede such award.

1 Hawk. c. 64, § 61; Dyer, 187.

If one justice of the peace have issued a warrant to compel a person to find surety of the peace, any other justice may, upon the person's entering into a recognisance before him for keeping the peace, supersede the former warrant.

1 Hawk. P. C. c. 66, § 14; Lamb. 95, 96, 99.

(C) In what Cases a Writ of *Supersedeas* may be awarded.

If a *capias* or an exigent have been awarded, the person against whom it was awarded may, whether he has or has not been arrested thereupon, have a writ of *supersedeas*.

Fitzh. N. B. 236.

But if a person have been arrested upon a *capias ad satisfaciendum*, no writ of *supersedeas* lies; because he is taken in execution.

Fitzh. N. B. 237.

If a declaration be not filed against a defendant, who is in prison, within two terms, he may have a writ of *supersedeas*: but the plaintiff may bring a second action; for, notwithstanding the former action was for want of declaring in due time superseded, the cause of action remains.

8 Mod. 306; *Henley v. Rosse*, Carth. 469.

Two sheep having been distrained, the owner applied for a writ of *supersedeas*. It was hereupon said, that this writ lies only for the person, and not for any chattels: but by *Lacon* it lies for both.

Bro. *Supers.* pl. 34.

(C) In what Cases a Writ of *Supersedeas* awarded.

A writ of *supersedeas* lies to process of outlawry.

Fitzh. N. 237.

If one justice of the peace have granted a warrant to compel a person to find surety of the peace, any other justice may, upon the person's entering into a recognisance before him for keeping the peace, supersede the former warrant.

1 Hawk. P. C. c. 66, § 14; Lamb. 95, 96, 99.

If a writ of *supplicavit* have issued from the Court of Chancery, to compel a man to find surety of the peace, he may, upon finding surety in that court, have a writ of *supersedeas*.

Fitzh. N. B. 238.

Heretofore if a justice of the peace had granted a warrant to compel a person to find surety of the peace, the Court of Chancery or King's Bench might, upon the person's finding surety, have granted a writ of *supersedeas* to the warrant.

Fitzh. N. B. 238; Lamb. 96.

But by the 21 Jac. 1, c. 8, § 3, after reciting, that divers turbulent and contentious persons, deservedly fearing to be bound to the peace or good behaviour by justices of the peace of the counties where they dwell, do oftentimes procure themselves to be bound to the peace or good behaviour in the Court of Chancery or King's Bench upon insufficient sureties, or upon colourable prosecution of some person or persons, who will be ready at all times to release them at their own pleasure; whereupon his majesty's writs of *supersedeas* are oftentimes directed to the justices of the peace, and others his majesty's officers, requiring them and every of them to forbear to arrest or imprison the parties aforesaid; by means whereof the said turbulent and contentious persons misdeemean themselves amongst their neighbours with impunity, to the great offence and disturbance of their neighbours, amongst whom they converse and live, to the affront of the justices of the peace, and to the evil example and encouragement of like ill-disposed persons, it is enacted, "That all writs of *supersedeas*, granted by either of the courts aforesaid, shall be void and of none effect, unless such process be granted upon motion in open court first made, and upon such sufficient sureties, as shall appear unto the judge or judges of the same court respectively, upon oath, to be assessed at five pounds lands or ten pounds in goods in the subsidy-book at the least; and unless it shall also appear unto the said judge or judges from whom such *supersedeas* is desired, that the process of the peace or good behaviour is prosecuted against him or them desiring such *supersedeas*, *bonâ fide*, and by some party grieved, in that court out of which such *supersedeas* is desired to be awarded."

If a person in a writ of right in a court-baron, or in any other court, vouch a foreigner to warranty, the tenant may sue forth a writ of *supersedeas* directed to the court, commanding them not to proceed till the warranty is determined.

Fitzh. N. B. 239.

If a court Christian, after a writ of prohibition has been awarded, proceed to excommunication, and a writ *de excommunicato capiendo* be awarded, a writ of *supersedeas* lies.

Fitzh. N. B. 239.

(C) In what Cases a writ of *Supersedeas* awarded.

It has been holden, that no writ of *supersedeas* shall be awarded by the Court of King's Bench to a writ *de excommunicato capiendo* before the writ is returned ; because the party, as the contrary cannot till then appear, may have been excommunicated for one of the causes mentioned in the 5 Eliz. c. 23.

1 Sid. 181, Anon.

But, if from the entry of a writ *de excommunicato capiendo* in the Court of King's Bench, it appear to have issued upon a sentence of excommunication for some cause not within the 5 Eliz. c. 23, the court may award a writ of *supersedeas* without waiting till it is returned ; otherwise the party, who, if taken into custody, must at the return of the writ be discharged, may in the mean time be deprived of his liberty upon a writ which ought not to have been awarded.

10 Mod. 351, 352 ; Rex v. Theed, Stra. 43.

It was in a modern case holden upon great consideration, that a writ of *supersedeas* ought not to be awarded to a writ *de excommunicato capiendo*, which issued from the Court of Chancery in England, upon a *significavit* from a court of delegates in Ireland, which sat under an authority derived from the Court of Chancery in England.

Sayer, 257, Rex v. Stephens.

If a plea of trespass *vi et armis* be holden in a sheriff's court, the defendant may have a writ of *supersedeas*, with a recital, that plea of trespass *vi et armis* shall not be holden in a less court than before the king himself, or other justices by his commandment.

Fitzh. N. B. 239.

If a sheriff hold plea of forty shillings, a writ of *supersedeas* lies.

Fitzh. N. B. 239.

If a man sue in the sheriff's court for an entire debt of more than forty shillings, by divers complaints each under the sum of forty shillings, the defendant may have a writ of *supersedeas* commanding the sheriff not to hold plea of those complaints.

Fitzh. N. B. 239.

If the constable of Dover hold plea of a thing which he ought not to hold plea of, a writ of *supersedeas* lies.

Fitzh. N. B. 240.

If a person, who on the account of privilege ought only to be sued in a certain court, be sued in any other court, he may have a writ of *supersedeas*.

Vaugh. 155, Bushel's case.

But, where a peer, being in custody upon a bill of Middlesex, moved for a writ of *supersedeas* upon a suggestion that he ought not to have been arrested, the court directed him to plead his privilege ; and said they could not upon motion take notice thereof.

Sty. 177, Earl Rivers's case.

If a process or writ have issued erroneously or improperly, a writ of *supersedeas* lies.

In an action upon the case for words spoken in London, the defendant justified for words spoken in the county of Suffolk. The plaintiff replied *de injuria sua propria*, and sued out a *venire facias* for London. A writ of *supersedeas* was awarded ; because the *venire facias* ought to have been for the county of Suffolk.

Lit. Rep. 314, Harvey's case ; Cro. Ja. 43.

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If a writ of *habere facias possessionem* have issued erroneously and been executed, a writ of *supersedeas* will lie to restore the possession.

Jenk. Cent. 58.

It is in the general true, that a writ of *supersedeas* does not lie where a writ of attain is brought; for a verdict having been found upon the oath *duodecim legalium et proborum hominum*, the law will not, upon so slight a ground as the bringing of a writ of attain, presume that it is a false verdict.

Skin. 42, the case of *certiorari*'s; Bro. *Supers.* pl. 24; Dyer, 81.

But if, after the defendant in an action of trespass *vi et armis* have brought a writ of attain, the plaintiff sue out an *elegit*, and a *capias* be awarded for the fine due to the king, the defendant may have writ of *supersedeas* as to the *capias*, upon a suggestion that since the bringing of the writ of attain the plaintiff has sued out an *elegit*.

Fitzh. N. B. 237, 238.

If an *audita querela* be brought, the plaintiff, if the *audita querela* be founded upon matter of record or writing, may have a writ of *supersedeas* to stay execution; but not if it be founded upon matter *in pais*.

2 Roll. Abr. 493, Morston v. Parrie; Fitzh. N. B. 104; Bro. *Supers.* pl. 24; Noy, 145; Cro. Eliz. 364; Salk. 92.

If an *audita querela* be brought after the party who brings it has been taken in execution, he may have a writ of *supersedeas* as to his body; but as he is only thereby discharged for a time, that he may the better prosecute the *audita querela* in case he be not relieved upon the *audita querela*, he shall again be a prisoner in execution.

2 Roll. Abr. 493, Whidner v. Conyers; Salk. 92.

If the plaintiff in an *audita querela*, after having been nonsuited, bring a second *audita querela*, he shall not have a writ of *supersedeas*.

Bro. *Supers.* pl. 35; 2 Roll. Abr. 492.

Heretofore, if a writ of error were brought, execution might in all cases be stayed by a writ of *supersedeas*.

But by the 3 Jac. 1, c. 8, after reciting, that his Highness's subjects are now more commonly withholden from their just debts, and often in danger to lose the same, by means of writs of error, which are now more commonly sued than they have heretofore been, it is enacted, "That no execution shall be stayed or delayed upon or by any writ of error, or *supersedeas* thereupon to be sued, for the reversing of any judgment given or to be given in any action or bill of debt upon any single bond for debt, or upon any obligation with condition for the payment of money only, or in any action or bill of debt for rent, or upon any contract, in any of the courts of record at Westminster, or in the counties palatine of Chester, Lancaster, or Durham, or in the courts of great sessions in Wales, unless such person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the court wherein such judgment is or shall be given shall allow of, shall, before such stay made, or *supersedeas* be awarded, be bound, unto the party for whom any such judgment is or shall be given, by recognisance to be acknowledged in the same court, in double the sum adjudged to be recovered by the said former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if

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the said judgment be affirmed, all and singular the debts, damages, and costs adjudged or to be adjudged upon the former judgment, and all costs and damages to be awarded for the same delaying of execution.”

[For cases upon this act, vide *supra*, Vol. i.] [tit. *Bail in Civil Causes*.]

The defendant, an executrix, pleaded *plene administravit*, and there was judgment against her *de bonis testatoris*. Upon bringing a writ of error it was moved, that she should not have a writ of *supersedeas* to stay execution, unless bail were put in as is required by the 3 Jac. 1, c. 8. It was holden, that the statute does not intend that there should be bail where the judgment is against the party himself, or where it is general against executors; but where the judgment against executors is special, namely, that execution shall be of the goods of the testator, and damages only of their own goods, it is not reasonable, nor the intent of the statute, that the executor should be obliged to find sureties to pay all the judgment may be affirmed for with his own goods; and Coke, C. J., said, it had ruled according to this difference in the Court of Common Pleas when he was there.

Cro. Ja. 350, Goldsmith v. Platt.

It has been holden, that no bail is necessary where a writ of error is brought upon a judgment in an action of debt upon a bond for payment of money upon a bottomry contract; for that such bond is not within the meaning of the statute.

Show. 14, Garret v. Dandy; Com. 332.

But it is in a later case laid down, that if the contingency mentioned in a bottomry bond have happened, it is in every respect a bond for the payment of money only, and that bail must be put in, in case a writ of error be brought upon a judgment in an action of debt upon the bond.

Stra. 476, Pitt v. Coney.

A bond was, with condition to pay money, and to do a collateral act. It was holden, notwithstanding the breach assigned was only the non-payment of the money, that the bond was not within the 3 Jac. 1, c. 8, and a writ of error brought upon a judgment in an action of debt upon the bond was allowed without bail.

Carth. 29, Gerrard v. Danby.

But where the condition of a bond was for the payment of 500*l.* at a certain day, being the sum mentioned in certain indentures, it was holden, that there ought to be bail in a writ of error brought upon a judgment in an action of debt upon the bond; for that the material part of the condition is the payment of the money, the other words being only added to show that the bond and the indentures are both securities for the same sum of 500*l.*

Stra. 959, Desbordes v. Horsey.

By the 13 Car. 2, st. 2, c. 2, § 9, after reciting the 3 Jac. 1, c. 8, and that divers other cases within the same mischief are not thereby provided for, it is enacted, “That no execution shall be stayed, in any of the courts therein mentioned, by any writ of error, or *supersedeas* thereupon, after any verdict, and judgment thereupon, in any action of debt, grounded upon the statute made in the second year of the reign of Edward the Sixth, for not setting forth of tithes, nor in any action upon the case upon any promise for the payment of money, action *sur trover*, action of covenant, detinue, or trespass, unless such recognisance, and in such manner as by the said

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act is directed, shall be first acknowledged in the court where such judgment is given."

By the 16 & 17 Car. 2, c. 8, § 3, it is enacted, "That no execution shall be stayed, in any of the courts mentioned in a statute made in the third year of the reign of James the First, by writ of error or *supersedeas* thereupon, after any verdict and judgment thereupon, in any action personal whatsoever, unless a recognisance, with condition as in the said statute is directed, shall be first acknowledged in the court where such judgment shall be given: and that, in a writ of error to be brought upon any judgment after a verdict in any writ of dower, or in any action *ejectione firmæ*, no execution shall be thereupon or thereby stayed, unless the plaintiff or plaintiffs in such writ of error shall be bound unto the plaintiff in such writ of dower or action of *ejectione firmæ*, in such reasonable sum as the court to which such writ of error shall be directed shall think fit, with condition, that if the judgment shall be affirmed in the said writ of error, or that the said writ of error be discontinued in default of the plaintiff or plaintiffs therein, or that the said plaintiff or plaintiffs be nonsuit in such writ of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sum or sums of money, as shall be awarded upon or after such judgment affirmed, discontinuance, or nonsuit had."

But by § 5, it is provided, "That this act, or any thing therein contained, shall not extend to any writ of error to be brought by any executor or administrator; nor unto any action popular, nor unto any other action, which is or hereafter shall be brought upon any penal law or statute, except actions of debt for not setting forth of tithes; nor to any indictment, presentment, inquisition, information, or appeal; any thing hereinbefore expressed to the contrary thereof notwithstanding."

It is in the general true, that a writ of *supersedeas* cannot be had upon a second writ of error, after the plaintiff in error has been nonsuited in a former writ of error in the same court, or such former writ of error has abated by the act of the party, or has been quashed. ||And execution may be sued out without leave of the court.||

Bro. *Supers.* pl. 35; Bro. *Err.* pl. 55; Latch, 57; 1 Vent. 100; 1 Mod. 285; Stra. 880, 1015; ||Birch v. Triste, 8 East, 412.||

But, if a person bring a writ of error in the Exchequer Chamber, as upon a judgment of the King's Bench, before judgment is signed, he may bring a second writ of error, and have a writ of *supersedeas* thereupon; for the first writ of error being a nullity, because brought too early, the second is to be considered as the first.

1 Vent. 100; 2 Roll. Abr. 492, Smith v. Bowles.

If a first writ of error abate by the act of God, or for want of form, or in any way not by the act of the party, a writ of *supersedeas* may be had upon a second.

Latch. 57, Crouch v. Haine; Bro. *Err.* pl. 55, pl. 140; ||Birch v. Triste, 8 East, 412.||

It was formerly holden, that if one writ of error in parliament had abated by a prorogation, and a second were brought in the next session, a writ of *supersedeas*, if a term had intervened, could not have been awarded upon the second writ of error; although the first did not abate by the act of the party.

1 Vent. 31, Wortley v. Holt; 2 Lev. 93.

(D) Of Writs which are *Supersedeases* by Implication.

But an order was made about the year 1764, by the House of Lords, that no cause therein depending shall be discontinued by a prorogation.

1 Vent. 266, Lord Eure v. Turton; 2 Lev. 93.

It has since the making of this order been insisted, that although the cause is not discontinued by a prorogation, the writ of error does abate; and a motion was made in the Court of Exchequer for leave to take out execution in such case. The motion was denied: and by the court—If the writ of error be abated by the prorogation, you may take out execution without applying to the court; if it be not, the court cannot give leave to do it. The business of the House of Lords, in their judicial capacity, goes over from session to session, as matters below do from term to term.(a)

Bunb. 131, Wright v. Grove, Trin. 9 G. 1.

Upon the reversal of a judgment upon a writ of error, the defendant, who was in custody, obtained a writ of *supersedeas*: but before she could get it allowed, she was charged with a new declaration at the suit of the same plaintiff. Application was hereupon made to the court, and she was ordered to be discharged. Being arrested a second time for the same debt for which the first action had been brought, the court was moved, that she might, upon entering a common appearance, have a writ of *supersedeas*. Wills, C. J., and Comyns, J., were of opinion, that, as she had had the benefit of a writ of *supersedeas* in the first action, which was at an end by the reversal of the judgment, the plaintiff was now at liberty to proceed in a second action. Denton, J., and Fortescue, J., were of opinion, that she ought to be discharged upon entering a common appearance. The court being divided, no rule was made.

Barnes, 499, Sherwin v. Bowes.

(D) Of Certain writs which are *Supersedeases* by Implication.

1. *A Writ of Audita Querela.*

It is in one case laid down that if an *audita querela* be brought upon a statute merchant before execution, it is a *supersedeas* by implication.

2 Roll. Abr. 493, pl. 4.

But it is in another case laid down, that an *audita querela* is never a *supersedeas* by implication.

Salk. 92, Langton v. Grant.

2. *A Writ of second Deliverance.*

The plaintiff in an action of replevin having been nonsuited, the defendant had judgment *de retorno habendo*, and a writ issued to inquire of the damages. A writ of second deliverance being afterwards brought by the plaintiff, it was holden to be a *supersedeas* by implication, as to the return of the goods, but not as to the writ of inquiry.

Latch, 72; Anon., Goldsb. 185.

3. *A Writ of Habeas Corpus ad faciendum et recipiendum.*

A writ of *habeas corpus ad faciendum et recipiendum* does so supersede the power of the court to which it is directed, that every proceeding after it is served, and before a *procedendo* is awarded, is void.

2 Roll. Abr. 493; Johnson v. Ellis, Cro. Eliz. 916; Cro. Car. 261; Salk. 352; 1 Mod. 195.

(D) Of Writs which are *Supersedeases* by Implication.

As the person of the defendant is by a writ of *habeas corpus ad faciendum et recipiendum* removed out of the jurisdiction of the inferior court, new bail must be put in, and the plaintiff must declare *de novo*.

Skin. 244, Dorington v. Edwin.

[Vide *suprà*, Vol. iv. tit. "HABEAS CORPUS," pp. 602, 603, &c.]

4. A Writ of Certiorari.

A writ of *certiorari*, in which are these words, *coram nobis terminari volumus et non alibi*, supersedes all proceedings subsequent to the delivery thereof, although the record intended to be certified be never certified.

Salk. 148; Cross v. Smith, Cro. Eliz. 915; Cro. Car. 261; Salk. 148; 2 Hawk. c. 27, § 64.

It has been holden, that a writ of *certiorari* is a *supersedeas* to the inferior court from the time it was sued out; in the same manner as the suing out of a writ of *supersedeas* from the court wherein a record is, which is an appearance upon record, will avoid an outlawry pronounced after, although the writ of *supersedeas* were not delivered to the sheriff before the *quinto exactus*.

1 Keb. 93; Rex v. Spelman, Moor, 73.

But it is laid down in other books that a writ of *certiorari* is not a *supersedeas* until it is delivered to the court or person to whom it is directed.

Cro. Eliz. 915; Fitzwilliam's case, Cro. Ja. 282; 6 Mod. 61.

And it is in some books laid down, that if a *certiorari* for removing an indictment before justices of peace be not delivered before a jury is sworn for the trial of the indictment, the justices may proceed.

Salk. 144; Rex v. North, 6 Mod. 61.

It is said, that a writ of *certiorari*, for removing a recognisance to appear at the next general assize, and in the mean time to be of good behaviour, is a *supersedeas* to the obligation of the recognisance.

Roll. 492, Anon.

But it is laid down in other books, that although the recognisance be in such case removed by the *certiorari*, the defendant is bound to appear; and that in default of appearance it shall be forfeited.

Cro. Ja. 482; Rosse v. Pye, Yelv. 207; 1 Bulstr. 156; 2 Hawk. P. C. c. 27, § 65.

[Vide *suprà*, Vol. ii. tit. "CERTIORARI," (D).]

5. Writ of Error.

A writ of error is a *supersedeas* by implication.

Cro. Ja. 534; Bishop of Ossory's case, Godb. 439.

If the record of a judgment be removed by a writ of error it is necessarily a *supersedeas*; for the record being removed, it is impossible for the justices of the court, in which it was, to award execution.

Bro. Exec. pl. 68; Bro. Supers. pl. 16, 17; Cro. Ja. 534; Skin. 422.

And when the record of a judgment is not removed, it would be quite unreasonable that the law should suffer a writ of error to be brought, the consequence of which may be a reversal of the judgment, and suffer execution to be taken out upon the judgment pending the writ of error.

Some of the parties' names having been omitted in a writ of error, execution was taken out upon the judgment; the plaintiff being advised that the record of the judgment was not removed by this defective writ; but it

(D) Of Writs which are *Supersedeases* by Implication.

was holden, that although the record was not thereby removed, the hands of the court were so tied up by the writ of error that a writ of execution ought not to have issued. Such defect may be a reason to quash a writ of error; but a defective writ of error is, until it be quashed, a *supersedeas*.

1 Mod. 28, Hughes v. Underwood.

A plaintiff who has signed judgment in a real action may, if his entry were lawful without the judgment, enter, notwithstanding a writ of error is brought; for he does not, in this case, enter by virtue of the judgment: and the writ of error shall not put him into a worse condition than he was before.

12 Mod. 398, Badger v. Floyd.

J N having obtained judgment against J S, he sued out a writ of *capias ad satisfaciendum*, to which the return was *non est inventus*. Hereupon he sued out a *scire facias* against his bail, and upon the return thereunto sued out a second *scire facias*.

2 Roll. Abr. 491, Lock v. Tillierd.

Before the return to the second *scire facias* the defendant brought a writ of error; it was holden that the writ of error was not a *supersedeas* to the proceedings against the bail; because these are founded upon an original different from that upon which the judgment is founded.

And for the same reason, if J N, after obtaining judgment against J S, proceed to judgment upon a *scire facias* against his bail, and the bail bring a writ of error, this shall not supersede execution upon the judgment against J S.

2 Roll. Abr. 491, C. pl. 5.

But, if a *scire facias* be brought to have execution upon a judgment, a writ of error brought upon the judgment will be a *supersedeas* to the proceedings upon the *scire facias*, because these are founded upon the same original as the judgment is.

2 Roll. Abr. 490, B. pl. 3.

Upon this distinction, between proceedings founded upon the same or different originals, it was formerly holden, that although a writ of execution cannot issue upon a judgment, pending a writ of error, an action of debt may be brought upon the judgment, because the action of debt is founded upon a different original.

Bro. Err. pl. 170; 2 Roll. Abr. 490, B. pl. 4; Dyer, 32.

But this doctrine was long ago questioned, and many attempts have been made to overthrow it.

It was once pleaded to an action of debt upon a judgment brought, pending a writ of error, that the record of the judgment was removed; but the opinion of the court was, that, notwithstanding the removal, the action lay.

Dyer, 32, Anon.

It is in one case said, that if an action of debt upon a judgment be brought before a writ of error, the action lies; but that if the writ of error be brought first, the action does not lie.

Raym. 100, Adams v. Tomlinson.

In answer to this distinction, the case of Limbuy v. Langham, which is cited by Dolben in a case in Skinner, and mentioned in Sir Thomas Raymond's Reports, has been frequently relied upon; wherein it was holden

(D) Of Writs which are *Supersedeas* by Implication.

by all the judges, that a writ of error, whether it be brought before or after an action of debt upon a judgment, is not a *supersedeas* to the action.

Skin. 388, *Grandvill v. Dighton*.

It was once pleaded in bar to an action of debt upon a judgment, that a writ of error was depending upon the judgment. This plea was, upon a demurrer, holden to be bad; but the opinion of the Court of King's Bench was, that if the same matter had been pleaded in abatement it would have been good.

Carth. 1, *Rogers v. Mayhoe*, Trin. 3 Jac. 2.

And in the same term a plea in abatement, wherein the same matter was pleaded, was holden by the Court of King's Bench to be good.

Carth. 191, *Aby v. Buxton*, Trin. 3 Jac. 2.

But another plea in abatement, wherein the same matter was pleaded, was shortly after holden to be bad; and it was laid down that such matter pleaded in abatement is as insufficient as if it had been pleaded in bar, and that such plea in abatement had never, except in the case of *Aby v. Buxton*, been holden to be good.

Show. 146, *Rottenhoffer v. Lenthall*, Pasch. 2 W. & M.

At another time a distinction was taken between an action of debt upon a judgment of the Court of King's Bench, and one upon a judgment of the Court of Common Pleas, or of any other court out of which the record of the judgment is removed by a writ of error; and it was holden, that a writ of error is not a *supersedeas* to an action of debt brought in the Court of King's Bench upon a judgment of that court; because the record, as only a transcript thereof is sent upon bringing a writ of error into the Court of Exchequer or the House of Lords, remains in that court; but a doubt was made, if such action would not lie in the Court of Common Pleas, upon a judgment of that court.

Sid. 236, *Adams v. Tomlinson*, Hil. 16 Car. 2.

This, which would be prejudicial to the Court of Common Pleas, is not reconcilable with what is laid down in divers books.

As long ago as the seventh year of Henry the Sixth, it was holden, that an action of debt would lie in the Court of Common Pleas upon a judgment of that court, notwithstanding a writ of error had been brought upon the judgment.

H. 6, 31; Bro. *Exec.* pl. 63; 8 E. 4, 6 b.

And it is laid down in divers cases, that a writ of error is only a *supersedeas* so far as to bind the hands of the court, that a writ of execution cannot be issued upon the judgment.

2 Roll. Abr. 491, D. pl. 3; 1 Lev. 153; 12 Mod. 391.

Upon the strength of these authorities it was, not many years after the doubt made in the Court of King's Bench, resolved by the Court of Common Pleas, that although the record of a judgment of the Court of Common Pleas be removed by a writ of error, an action of debt will lie in that court upon the judgment pending the writ of error.

3 Lev. 397, *Gale v. Hill*, Pasch. 6 W. & M.

At length courts of justice hit upon a method of preventing the effect of an action of debt brought upon a judgment pending a writ of error. This was, (and indeed there was no other way of doing it, without determining contrary to what had been holden in a number of cases,) by making a rule,

(D) Of Writs which are *Supersedeas* by Implication.

that upon giving judgment in the action, execution shall be stayed until the writ of error is determined.

The practice of making such rules seems to have been introduced at the latter end of the reign of William the Third, or early in the reign of Queen Anne; for in the fifth year of the reign of William and Mary, it was holden by the Court of King's Bench, that such action would lie; and no notice is taken of any method to render it ineffectual.

Skin. 388, *Glanville v. Dighton*.

In one case, which was in the fifth year of the reign of Anne, the law is said to be settled, that a writ of error is a *supersedeas* to all proceedings upon a judgment.

11 Mod. 78, *Anon*.

But it appears from later cases, that unless application be made to the court to stay the proceedings, an action of debt upon a judgment may not only be proceeded in, pending a writ of error, but that execution may be taken out upon the judgment in such action.

1 Barn. 202, *Humphries v. Daniel*, East. 9 G. 2; Ibid. 143. ||This is the rule in the Court of C. B., Willes, 184; but in B. R. it is otherwise. Vide *infra*.||

If this be so, it could not in the fifth year of the reign of Anne have been settled, that a writ of error is a *supersedeas* to all proceedings upon a judgment: but it was probably about that time settled, that if an action of debt have been brought upon a judgment, after a writ of error has been brought upon the judgment, the court will, upon giving judgment in the action of debt, order execution in that action to be stayed until the writ of error is determined.

Clarkson v. Physic, Mich. 13 G. 2.

||It is now settled in the court of K. B., that the plaintiff in such case cannot take out execution on the second judgment until the writ of error on the first be determined; and if he do, the court will set aside such execution.

Taswell v. Stone, Burr. 2454; *Benwell v. Black*, 3 Term R. 643.

But where the plaintiff brought an action on a judgment several years after it had been obtained, and obtained judgment in this action, and after the second judgment the defendant sued out a writ of error on the first, it was held that the plaintiff might, notwithstanding, take out execution on the second judgment.

Bishop v. Best, 3 Barn. & A. 275.

If a defendant be supersedeable for want of judgment being entered up in time, but not actually discharged, he cannot be detained in an action on the judgment; for the actual discharge relates back to the time when the prisoner has a right to be discharged.

Pierson v. Goodwin, 1 Bos. & P. 361.||

Upon a rule to show cause why a writ of *fieri facias* should not be set aside, and why the money levied thereupon should not be restored, it appeared that a writ of error *coram vobis* had been brought and allowed; that the plaintiff's attorney had been served with a notice of the allowance before the writ of *fieri facias* was sued out; that the writ of error was not determined; and that the writ of *fieri facias* was sued out without leave of the court. The rule was made absolute; and by the court—A writ of error *coram vobis* is not a *supersedeas* in itself: but execution cannot be taken out whilst it is depending, without leave of the court. It would be very un-

(E) When a Writ of Error a *Supersedeas*.

reasonable that it should be in the power of a plaintiff to take out execution upon a judgment without leave of the court, whilst a question is depending concerning a fact, by which, in case the fact be as it is alleged, his right of action will be destroyed.

Sayer, 166, Ridout v. Wheeler; [Birch v. Trieste, 8 East, 416.]

[See farther on this division, *suprà*, Vol. iii. tit. "ERROR," (H).]

(E) Of certain Requisites which are necessary to the making of a Writ of Error a *Supersedeas* by Implication.

It has, under the last head, been shown that a writ of error is in the general a *supersedeas* by implication; but it should be remembered that it is not so unless certain requisites have been complied with.

1. *It must be allowed.*

It has been holden, that a writ of error is a *supersedeas* from the time of its being sealed.

1 Mod. 28, Hughes v. Underwood; 1 Ventr. 30; 1 Keb. 12.

But the better opinion is, that a writ of error is not a *supersedeas* until it be allowed, except notice of its having been sued out be given to the defendant in error.

Salk. 321, Perkins v. Woolaston; 1 Vent. 255; 1 Mod. 112; 6 Mod. 130; Poph. 132; 8 Mod. 147.

Notice to the defendant of a writ of error having been sued out, is, however, only a temporary *supersedeas*: for if the writ be not allowed within four days after it is sued out, execution may be taken out.

1 Mod. 112, Lampiere v. Mereday; 1 Ventr. 255; 2 Keb. 129.

The allowance of a writ of error, although no notice is given of its having been sued out, makes it a *supersedeas*: but, although a writ of error be, from the time of the allowance, a *supersedeas*, an attorney, who takes out execution after the allowance, is not guilty of a contempt unless he had notice of its having been sued out.

Salk. 321, Perkins v. Woolaston; 6 Mod. 130; 2 Roll. Abr. 492; 1 Ventr. 30; Rep. of Pr. in C. B. 35, 39; Stra. 632; 1 Mod. 148.

Other writs of error, being writs of right, are allowed of course: but a writ of error *coram vobis* cannot be allowed without leave of the court.

Stra. 949, Horne v. Bushel; 1 Ventr. 207; Stra. 690.

And the court will not give leave for the allowance of a writ of error *coram vobis*, unless there be an affidavit of some error in fact; by which, in case the fact be as it is alleged, the plaintiff's right of action will be destroyed.

Sayer, 166, Ridout v. Wheeler.

[But, although it be true, that a writ of error is a *supersedeas* from the allowance; yet, as it is the practice to sue out the writ of error before judgment is signed, the courts have said it shall not operate as an allowance till the judgment is actually signed, and the party shall be allowed four days after the judgment signed to put in bail; for before the judgment no bail can justify. As to the service of the allowance, that is only material to bring the party into contempt if he proceeds to sue out execution afterwards.

Jaques v. Nixon, 1 Term R. 272; Doe v. Bracebridge, Ibid.]

(E) When a Writ of Error a *Supersedeas*.

2. *Bail must be put in thereto.*

If the Chief Justice, to whom a writ of error is directed, die before it is returned, the writ becomes ineffectual: but execution cannot be taken out without leave of the court.

Barnes, 201, *Cramborne v. Quennel*.

Upon a rule to show cause why a *scire facias*, which had been sued out upon a judgment, should not be set aside, it appeared that a writ of error was delivered to the clerk of the errors before the *scire facias* was sued out, but that bail was not put in at the time of suing it out. The rule was made absolute; and by the court—Upon the delivery of a writ of error to the clerk of the errors, it becomes a *supersedeas* to a *scire facias* upon a judgment; and continues to be so for the space of four days from the allowance of the writ; after which time, if the plaintiff in error neglect to put in bail, it ceases to be a *supersedeas*.

Sayer 52, *Spratt v. Frederick*.

Execution having been taken out after special bail was put in to a writ of error, because notice was not given of bail being put in, a writ of *supersedeas* was granted; and by the court—The putting in of bail, if no exception be taken thereto, is sufficient to stay execution; for the giving of notice is not necessary, and is only done for the sake of making the party who takes out execution after notice liable to be proceeded against for the contempt.

1 Keb. 690, *The Dean of St. Pauls v. Capel*, 3 Lev. 312.

In an action against five defendants, damages of twenty pounds were found by a verdict against four of them, and five shillings against the other, who had suffered judgment to go by default. A writ of error was brought by the four, in the name of him against whom the judgment by default was; and as he was not obliged to put in bail, no bail was put in: the court gave leave to take out execution notwithstanding this writ of error.

Barnes, 202, *Mason v. Simmonds*.

A writ of error was brought in the Court of King's Bench upon a judgment of the Court of Common Pleas; and the judgment was affirmed. Upon bringing a writ of error afterwards in parliament, it was insisted, that no new recognisance was required by the 3 Jac. 1, c. 8; but by the court—The first recognisance does not include the payment of costs to be assessed in the House of Lords; and therefore a new recognisance ought, within the meaning of that statute, to be entered into. It is not the business of this court to inquire whether bail were put in to the first writ of error; inasmuch as the want of bail does not prevent the proceeding upon a writ of error, for it only prevents its being a *supersedeas*.

Salk. 97, *Tilley v. Richardson*; 8 Mod. 80; Stra. 527.

[Vide *suprà*, Vol. iii. tit. "ERROR," (B).]

3. *It must be proceeded in without delay.*

If there be too long a day between the teste and the return of a writ of error, or if the plaintiff in error do not remove the record before the return-day, execution may be taken out; it plainly appearing that the writ of error was brought for delay.

Jenk. 93, pl. 80; 2 Roll. Abr. 491.

A motion was made in Michaelmas term, that the time of the return of

(F) To what Time a Writ of Error relates as a *Supersedeas*.

a writ of error, brought upon a judgment of the Court of King's Bench, which was made returnable in the Court of Exchequer in Hilary term following, might be shortened; or that the court would award execution. As to the first point, the court said, that, as the writ had issued from the Court of Chancery, they had no power to make any alteration therein. As to the second point, the court said, that the law is open to all men; and, if the return be as suggested, execution may be taken out: for, if a writ of error be sued out with too long a return, it is not a *supersedeas*.

Sid. 44; Anon., Jenk. 93, pl. 80.

It has been holden, that a writ of error returnable *ad proximum parliamentum* is not, by reason of the distance of the return, a *supersedeas*.

1 Ventr. 31, Wortley v. Holt.

A writ of error in parliament being made returnable the first day of a session, the house was moved, that if the plaintiff in error do not transcribe the record within eight days, execution may be taken out. An order was made to show cause; but it was afterwards discharged; for that, as by the order of the house of the 13th day of July, 1678, fourteen days after the beginning of the session in which a writ of error is returnable are given to transcribe the record, it is not reasonable that the defendant in error should take out execution within that time.

Com. 420, Barnes v. Otway.

But, where a record was not transcribed within fourteen days after the beginning of a session, it was ordered that the record should be transcribed and certified into parliament within eight days, or that the defendant in error should be at liberty to take out execution.

Bunb. 69, Frost v. Dawes.

(F) To what Time a Writ of Error relates as a *Supersedeas*.

ALTHOUGH the teste of a writ of error be before judgment, it is good, in case there be judgment before the return of the writ.

1 Mod. 112, Anon. [Vide Tidd's Pract. 1186, 7th ed. and cases there cited.]

A writ of error being returnable on the essoin-day of Hilary term, and judgment not being signed till three days after the essoin-day, the plaintiff, apprehending the record was not removed by the writ of error, took out execution. The execution was set aside with costs; and by the court—As every judgment relates to the essoin-day of the term of which it is entered, the record was well removed.

Barnes, 198, White v. Morgan.

Execution having been taken out upon a judgment signed in a Trinity vacation, notwithstanding the allowance of a writ of error returnable in the Trinity term, it was set aside with costs; and by the court—The judgment, although signed in the vacation, related to the first day of the preceding term; and, consequently, as it was signed before the return of a writ of error, the writ of error was a *supersedeas*.

Barnes, 196, Warwick v. Figg.

The plaintiff having obtained a verdict at an assize in a long vacation, the defendant brought a writ of error, which was allowed, and bail put in on the 24th day of October following. Upon the 27th day of October, the plaintiff entered judgment generally, and took out execution, teste the first day of the then Michaelmas term, which was executed before notice was

(G) What the Effect of a *Supersedeas* is.

given of the writ of error. But restitution was awarded; and by the court—By the putting in of bail to the writ of error, the hands of the court were so tied up, that the execution, although no notice was given of the writ of error, is void. The judgment does, indeed, the entry being general, relate to the first day of the Michaelmas term, namely, the 23d day of October, and the execution relates to the same day; and, consequently, the date of both is antecedent to the allowance of the writ of error, which was upon the 24th day of October: but as the judgment is founded upon a verdict in the vacation of Trinity term, it could not be entered till the *quarto die post*; namely, until the 27th of October, before which day the writ of error was allowed.

3 Lev. 312, *Smith v. Cave*; Hob. 329; 8 Mod. 148.

A plaintiff not having signed his judgment until the return-day of a writ of error was past, the question was, whether the writ of error were a *supersedeas*? It was holden that it was not; and by the court—The plaintiff may sign his judgment when he pleases; and, as he did not in fact sign it till after the return-day of the writ of error, the writ did not attach upon the judgment.

Rep. of C. B. 5 Pr. in *Harding v. Avery*, Mich. 2 G. 2.

In a subsequent case wherein the plaintiff, who had been called upon to do it, delayed the signing of judgment until the return-day of a writ of error was past, the court ordered him to pay the defendant his costs, and to sue out a new writ of error at his own expense. The reporter of this case cites the case of *Harding v. Avery*, and adds *quære tamen*; for it does not appear that the plaintiff has in this case in any manner misbehaved himself.

Rep. of Pr. in C. B. 71, *Duffield v. Warden*, East. 5 G. 2.

In another subsequent case, wherein the plaintiff's attorney, who had artfully delayed the signing of judgment until the return-day of a writ of error was past, then signed judgment, and brought an action of debt upon the judgment, a rule was made for staying proceedings in the action; and that a new writ of error should be sued out at the attorney's expense.

Barnes, 250, *Arden v. Lamley*, East. 8 G. 2; ||Tidd's Prac. 1186, (7th ed.)||

In a very modern case, the plaintiff's attorney, notwithstanding he had notice of the allowance of a writ of error, delayed the signing of judgment until the return-day of the writ of error was past, and then signed judgment, and took out execution. A rule was made for setting aside the execution, and that a new writ of error should be sued out at the attorney's expense; and by Lord Mansfield, C. J.—In the case of *Arden v. Lamley*, (*suprà*,) a rule of the same kind, notwithstanding there are some old cases to the contrary, was made.

MS. Rep. *Fisher v. Brandon*, Hil. 5 G. 3, in C. B.

(G) What the Effect of a *Supersedeas* is.

UPON a demurrer to a declaration in an action of false imprisonment against a sheriff, it was said, that as the defendant had arrested the plaintiff upon a *capias* before a writ of *supersedeas* was delivered to him, he was not bound, the arrest being lawful, to discharge him, but may return the writ upon which he was arrested, together with the writ of *supersedeas*, for the court to do as they think proper: but it was holden unanimously, that the writ of *supersedeas* was as obligatory upon the sheriff to discharge the plain-

(G) What the Effect of a *Supersedeas* is.

tiff as the *capias* was to arrest him ; and that, as he did not obey it, he is liable to an action of false imprisonment.

Cro. Ja. 379, Withers v. Henley.

If a *capias ad satisfaciendum* have issued upon a judgment, and the defendant be arrested upon it, the sheriff is not bound to discharge him, notwithstanding a writ of *supersedeas* be delivered to him, or he have notice of the allowance of a writ of error ; because the defendant is in that case taken in execution.

1 Ventr. 2, Anon. ; Fitzh. N. B. 237 ; Jenk. 92, pl. 80.

But if the person who is arrested upon a *capias ad satisfaciendum* have a writ of *supersedeas* in his pocket, and deliver it to the sheriff immediately upon being arrested, he ought to be discharged.

Jenk. 92, pl. 80.

After the reversal of a judgment, the defendant, who was in custody, sued out a writ of *supersedeas* : but before she could get the writ allowed, the plaintiff charged her with another declaration. She was, notwithstanding this declaration, ordered to be discharged ; and by the court—As the defendant was in custody at the plaintiff's suit only, she could not regularly be charged with a second declaration after the reversal of the judgment upon which she had been wrongfully detained.

Barnes, 368, Peachey v. Bowes.

If goods be taken in execution after the suing out a writ of *supersedeas*, or the allowance of a writ of error, the court, although the writ were not delivered to the sheriff, or although notice were not given to him of the allowance of the writ of error before the taking of the goods, will order restitution, or, in case the goods have been sold, will order the money to be brought into court.

1 Ventr. 30, Cotton v. Daintry ; Rep. of Pr. in C. B. 35, 39.

It has been holden that if, before sale of goods which have been seized under a *fieri facias*, the defendant deliver a writ of *supersedeas* to the sheriff, he shall have the goods again ; for that the property is not altered by the seizure.

2 Roll. Abr. 491, Sare v. Sheldon.

But this case does not seem to be law ; for it is laid down in other books, that, if an execution be begun, it shall, notwithstanding the delivery of a writ of *supersedeas*, or the allowance of a writ of error, proceed.

2 Roll. Abr. 492, (D,) pl. 6 ; Ibid. 493, H. pl. 2 ; Dyer, 98 ; Yelv. 6 ; 1 Vent. 255 ; Salk. 323 ; Ld. Raym. 990.

A sheriff having seized goods under a *fieri facias* upon a judgment of the Court of King's Bench, the record, before the sale of the goods, was removed by a writ of error into the Exchequer-chamber, and a writ of *supersedeas* was awarded. Upon the return of the sheriff to the *fieri facias*, that he had seized the goods, and that they remained in his hands *pro defectu emptorum*, restitution was prayed. It was holden that, as the execution was begun before the writ of *supersedeas* was delivered to the sheriff, a writ of *venditioni exponas* should be awarded to perfect it ; and that, although the plea-roll be removed by the writ of error, the writ of *venditioni exponas* may be awarded from the return to the *fieri facias*.

Cro. Eliz. 597, Charter v. Peter.

But, if a writ of execution have issued contrary to a rule of court, or

(H) How Disobedience to a *Supersedeas* punished.

upon a judgment entered irregularly, it may, notwithstanding it has been in part executed, be set aside, *quia improvidè emanavit*.

Jenk. 93, pl. 80.

If a person, who has been taken in execution, and his lands extended upon a statute merchant, bring a writ of *audita querela*, he may have a writ of *supersedeas quoad* his person: but, as the writ of *supersedeas* is awarded for the sake of giving him an opportunity of prosecuting the *audita querela*, he shall, in case he be not relieved upon the *audita querela*, be taken into custody again.

2 Roll. Abr. 493, Whidner v. Conyers.

Upon a rule to show cause why a judgment should not be set aside for irregularity, and why the defendant should not be discharged out of custody, it appeared, that, eight years before, a writ of *supersedeas* had been awarded, for discharging the defendant out of custody, because he was not charged in execution in proper time after judgment had been signed against him; and that he was now in custody upon a *capias ad satisfaciendum* which had issued upon a judgment in an action of debt upon the former judgment. The rule was made absolute; and by the court—It has been truly said, that, after a defendant has been discharged out of custody for want of being charged in execution in proper time, his person cannot be afterwards taken in execution upon the same judgment: but this does not apply to the present case; for the defendant has not been taken in execution upon the judgment in the former action, but upon a judgment in a different action.

MS. Rep. Baldwin v. Foot, East. 14 G. 3, in C. B. [*Qu.* If this case, which was added by the last editor, be not misstated, as to the judgment of the court; and whether, from the reasoning of the court, we should not read, that the rule was *discharged*, instead of *made absolute*.] The case is fully reported, in Cowp. R. 72, by the name of Blandford v. Foot, from which it appears that the rule was discharged. The same point was decided in 15 Geo. 3, Ismay v. Dewin, 2 Black. R. 982. And taking it so, it perfectly accords with the doctrine of a late case, that a *supersedeas* obtained after judgment cannot be pleaded in bar to an action on that judgment, this being a new action. Topping v. Ryan, 1 Term R. 273. Besides, the rule that a *prisoner who is once supersedable always continues so*, only holds so long as he remains in the same custody, and under the same process. Rose v. Christfield, 1 Term R. 591.]

(H) How Disobedience to a *Supersedeas* may be punished.

If a sheriff, or other officer, detain a person in custody, who has been arrested upon a *capias* or an exigent, after a writ of *supersedeas* delivered to him, an action of false imprisonment lies.

Cro. Ja. 379; Wythers v. Henley, 1 Roll. R. 241; 3 Bulstr. 97; Fitzh. N. B. 236.

But no action lies for detaining a person who has been arrested upon a *capias ad satisfaciendum*; because such person is taken in execution.

1 Ventr. 2, Anon.; Fitzh. N. B. 237; Jenk. 92, pl. 80.

||But the defendant could not in the above case have been taken in execution upon the same judgment after his discharge: for the rule is, that where a defendant is superseded for want of proceedings *before* judgment, he may be taken afterwards in execution upon that judgment; but *aliter* where he is superseded for want of being charged in execution *after* judgment.

Line v. Lowe, 7 East, 330; Tidd's Prac. 377, (7th ed.)||

A judge of an inferior court is liable to be punished for a contempt, if

(A) In what Cases a Justice may compel Surety of Peace.

he proceed in a cause after the delivery of a writ of *habeas corpus ad faciendum et recipiendum*, or after notice of the allowance of a writ of error.

2 Hawk. c. 22, § 28.

A sheriff is liable to be punished for a contempt, if he proceed in a cause in his county court after the delivery of a writ of *supersedeas*.

Fitzh. N. B. 14; Fitzh. *Replev.* 31.

Justices of the peace, or commissioners of sewers, are liable to be punished for a contempt if they proceed in a matter after the delivery of a writ of *certiorari*.

Moor, 677, Fitzwilliam's case; 1 Mod. 44; Cro. Eliz. 915; 2 Hawk. c. 22, § 28.

A sheriff who has taken a person, or the goods of a person, in execution after the delivery of a writ of *supersedeas*, or after notice of the allowance of a writ of error, is liable to be punished for a contempt.

1 Vent. 30, Cotton v. Daintry; Rep. of Pr. in C. B. 35.

If an attorney take out execution after notice of the allowance of a writ of error, he is liable to be punished for a contempt.

Barnes, 376, Hannot v. Farrettes; Rep. of Pr. in C. B. 35.

SURETY OF THE PEACE.

SURETY of the peace is a recognisance entered into to the king for keeping the peace.

Under this title it will be proper to show,

- (A) In what Cases a Justice of the Peace may, *ex officio*, compel a Person to find Security for keeping the Peace; ¶and whether this can be done by any other Person.¶
- (B) Who may crave Surety of the Peace.
- (C) Against whom Surety of the Peace may be granted.
- (D) In what Cases Surety of the Peace ought to be granted.
- (E) The Manner of granting Surety of the Peace by the Court of Chancery.
- (F) The Manner of granting Surety of the Peace by the Court of King's Bench.
- (G) The Manner of granting Surety of the Peace by a Justice of the Peace.
- (H) In what Cases a Recognisance for keeping the Peace is forfeited.
- (I) In what Cases a Recognisance for keeping the Peace may be discharged.

(A) In what Cases a Justice of the Peace may, *ex officio*, compel a Person to find Security for keeping the Peace; ¶and whether this can be done by any other Person.¶

A JUSTICE of the peace may, at his discretion, bind all those to keep the peace, who in his presence shall make any affray, or shall threaten to kill or beat any person, or shall contend together with hot words; and all those

(B) Who may crave Surety of the Peace.

who shall go about with unusual weapons or attendants, to the terror of the people; and all such persons as he shall know to be common barrators; and who shall be brought before him by a constable for a breach of the peace in the presence of such constable; and all persons who, having been before bound to keep the peace, shall be convicted of having forfeited their recognisance.

Lamb. 77, 78; Bro. *Peace*, pl. 7, 8; 1 Hawk. c. 60, § 1.

||It is said, that if a constable see persons either engaged in an affray, as striking, or offering to strike, or drawing their weapons, &c., or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice of the peace, to the end that such justice may compel him to find sureties for the peace, &c., or he may imprison him, of his own authority, for a reasonable time, till the heat shall be over, and also afterwards detain him till he find such surety by obligation.(a)

1 Hawk. P. C. p. 490, (8th ed.) and books there cited. (a) Conservators of the peace may also grant surety according to their discretion. 4 Burr. And this seems to have been the principal duty of a conservator. 11 Sta. Tri. 316. A secretary of state, therefore, or privy councillor, never bind to the peace or the good behaviour, for they are not, as such, conservators of the peace. Lord Holt, indeed, in one case, so considered them; but Lord Camden affirms, that no treatise, case, record, or statute has ever called them such. 11 Sta. Tri. 317.¶

(B) Who may crave Surety of the Peace.

ALL persons under the king's protection, being of *sane* memory, whether natural-born subjects or aliens, good subjects or attainted of treason or other crime, have a right to crave surety of the peace.

Lamb. 78, 79, 80; 1 Hawk. c. 60, § 2.

It has been questioned, whether Jews or Pagans, or persons attainted of *præmunire*, have a right to crave surety of the peace.

Lamb. 80; 1 Hawk. c. 60, § 3.

A wife may crave surety of the peace against her husband, if he threaten to beat her outrageously, or to kill her.

Fitzh. N. B. 80; Lamb. 80; 2 Lev. 128; 1 Hawk. c. 60, § 4; ||Rex v. Doherty, 13 East, 171; Lord Vane's Ca., Stra. 1202; 13 East, 171, *notd*; Rex v. Bowes, 1 Term R. 696.¶

A woman exhibited articles of the peace, in which she called herself the wife of the defendant, and set forth the pendency of a suit in the ecclesiastical court for the restitution of conjugal rights. When the defendant came to put in bail, he desired that the recognisance might not be taken so as to carry with it an admission of a marriage: and the court ordered it to be in these terms:—"To keep the peace towards our Sovereign Lord the king, and all his liege people, and particularly towards Hannah Pemm, who hath exhibited articles of the peace against him the said James Bambridge, by the name of Hannah Bambridge, wife of him the said James."

Stra. 1231, Rex v. Bambridge.

Surety of the peace may be craved by a husband against his wife.

Stra. 1207, Sims's case; 1 Hawk. c. 60, § 4.

It is said, that surety of the peace is usually granted at the request of one person, for that the fear of one person can scarce ever be the fear of another; and that, if surety of the peace be granted against two or more persons, every one of them must enter into a separate recognisance.

Pult. 18.

(D) In what Cases Surety of the Peace ought be granted.

But in a modern case, the Court of King's Bench allowed three women to file joint articles of the peace against three men.

MS. Rep. *Rex v. Nettle and two others*, Mich. 23 G. 2. [See Com. Dig. tit. *Justices of the Peace*, (B) 5.]

(C) Against whom Surety of the Peace may be granted.

SURETY of the peace may be granted against every person of *sane* memory, whether of full age or under age.

Lamb. 82; 1 Hawk. c. 60, § 5.

If surety of the peace be granted against an infant or feme covert, who cannot themselves be bound, a recognisance must be entered into by their friends

1 Hawk. c. 60, § 5; Lamb. 81.

(D) In what Cases Surety of the Peace ought to be granted.

If one person have just cause to fear that another person will burn his house, or do him some corporal hurt; or that he will procure a third person to do him some corporal hurt, surety of the peace ought to be granted.

Lamb. 82; 1 Hawk. c. 60, § 6; Stra. 473.

It is said that surety of the peace ought not to be granted for threatening to imprison; because damages may be recovered in an action of false imprisonment.

Bro. *Peace*, pl. 22.

But the better opinion is, that it ought to be granted in such case, because imprisonment is a corporal hurt. The reason given for its not being granted is no more conclusive in this case than in that of a battery: for an action will lie for a battery; and yet surety of the peace ought to be granted for threatening to beat.

Lamb. 83; 1 Hawk. c. 60, § 7.

Surety of the peace ought to be granted against a husband, if he give his wife unreasonable correction.

Moor, 874, *Sir Thomas Seymour's case*; Godb. 215; Fitzh. N. B. 80; [Rex v. Doherty, 13 East, 171; Lord Vane's ca., Ibid. *notā*.]

Divers persons having made a disturbance in a church, and pulled the minister, who was reading the Common Prayer, out of the desk, the Court of King's Bench gave leave to exhibit articles of the peace against them.

1 Keb. 290, *Rex v. Douglas*.

If one person threaten to hurt the wife or child of another, surety of the peace ought to be granted.

Dalt. 266.

But surety of the peace ought not to be granted because one person threatens to hurt the servant or cattle of another.

Lamb. 83.

Surety of the peace ought not to be granted on account of a past bearing, unless there be fear of future danger; the remedy in such case being by action or indictment.

Dalt. 266.

Surety of the peace ought to be craved soon after the cause of the fear on account of which it is craved; for the suffering of much time to pass before it is craved shows that the party craving it has not been under great fear.

6 Mod. 132.

(E) The Manner of granting Surety of the Peace by the Court of Chancery.

At the common law it was sufficient, in order to obtain process for surety of the peace from the Court of Chancery, for the party who craved it to make oath that he was in fear of a corporal hurt; and that he did not crave surety of the peace from malice, but for the safety of his person.

Fitzh. N. B. 79, 80.

But by the 21 Jac. 1, c. 8, after reciting that divers turbulent and contentious persons, some out of malice, and others in hope of gain by way of composition, do oftentimes upon their corporal oaths, or otherwise upon false suggestions and surmises, procure process of the peace or good behaviour out of his majesty's courts of Chancery and King's Bench, against divers of his majesty's quiet subjects, whose dwellings and abodes are for the most part in counties far distant and remote from the said courts, to their intolerable trouble and vexation; whereas they might, upon good cause showed, receive justice at the hands of the justices of the peace in the counties where they dwell, it is enacted, "That all process of the peace or good behaviour, to be granted or awarded out of the said courts, or either of them, against any person or persons whatsoever, at the suit of, or by the prosecution of, any person or persons whatsoever, shall be void and of none effect, unless such process shall be granted or awarded upon motion first made before the judge or judges of the same courts respectively sitting in open court; and upon declaration in writing upon their corporal oaths, to be then exhibited by the parties which shall desire such process, of the causes for which such process shall be granted or awarded by or out of the said courts respectively; and unless such motion and declaration be mentioned to be made upon the back of the writ, the said writings there to be entered and remain of record; and if it shall afterwards appear to the said courts, or either of them respectively, that the cause expressed in such writings, or any one of them, be untrue, then the judge or judges of the said courts, or either of them respectively, shall and may award such costs and damages unto the parties grieved, for their or any of their wrongful vexations in that behalf, as they shall think fit; and that the party or parties so offending shall be committed to prison by such judge or judges, until he or they shall pay the said costs and damages."

If articles of the peace be exhibited in the Court of Chancery, and oath be made, that the surety of the peace is not craved by the party from malice, but for the safety of his person, a writ of *supplicavit* issues, directed to the justices of the peace generally, or to some one justice of the peace, or to the sheriff, commanding them or him to take security in the sum thereon endorsed, and if the party refuse to find such security, to commit him to the next jail until he do find such security.

Fitzh. N. B. 80.

If a writ of *supplicavit* be directed to the sheriff, he may issue a precept to a bailiff to arrest the party; but only the sheriff himself can take a recognisance; for the power given by the writ being judicial, it cannot be delegated.

Bro. Offic. pl. 39; Fitzh. N. B. 81.

If a writ of *supplicavit* be directed to the justices of the peace generally, only the justice of the peace to whom it is delivered can grant a warrant to compel the party to find security. The warrant must likewise be made re-

(F) Manner of granting Surety of Peace in K. B.

turnable before the justice of the peace to whom it is delivered; for only he can take a recognisance or make a return to the writ.

Bro. *Peace*, pl. 9; Lamb. 107.

The recognisance to be entered into before the justice of the peace, to whom a writ of *supplicavit* is directed or delivered, must be in such sum as is endorsed upon the writ.

1 Hawk. c. 60, § 15; Lamb. 101.

The sum, in which security is to be given upon a writ of *supplicavit*, is sometimes very large. A writ of *supplicavit* was once endorsed in the sum of 4000*l*.

2 P. Wms. 202, Clavering's case. [The sum is to be reasonable, according to the circumstances of the party. Keyn's case, 2 Ves. & B. 182; Dobbin's case, 3 Ves. & B. 183; Tunnycliff's case, 1 Jac. & W. 348.]

If no return be made to a writ of *supplicavit*, the party who sued it out may have a writ of *certiorari*, directed to the person who ought to make a return, commanding him to certify the writ of *supplicavit*, together with what has been done thereupon.

Fitzh. N. B. 81; Lamb. 108, 109.

If a writ of *supplicavit* have issued from the Court of Chancery against a person, he may, by himself or some friend, come into the court and give security there that he will not do any harm to the person who sued out the writ; and thereupon he shall have a writ of *supersedeas*, reciting the writ of *supplicavit* and the security given, directed to the justices of the peace generally, or to some one justice of the peace, or to the sheriff, commanding them or him to surcease to arrest the person against whom the writ of *supplicavit* issued; or, in case he have been arrested for that cause, and no other, to deliver him.

Fitzh. N. B. 81, 238.

(F) The Manner of granting Surety of the Peace by the Court of King's Bench.

At the common law, the oath of the party was a sufficient ground for the Court of King's Bench to grant surety of the peace; but this court cannot, since the statute made in the twenty-first year of the reign of King James the First, grant surety of the peace, unless articles of the peace are exhibited in open court.

Ante, p. 297.

Mullineux, who had been taken into custody upon a writ of *supplicavit* out of the Court of Chancery, being brought by a *habeas corpus* before Jones, Justice of the King's Bench, he entered into a recognisance to appear in the Court of King's Bench the first day of the next term. He appeared at the time; and the court was moved that the articles exhibited in the Court of Chancery might be read, and that he might enter into a recognisance for keeping the peace. No rule was made; and by the court—The record is not before us. If the witnesses who swore to the articles in the Court of Chancery had been here, and had sworn to articles to the same effect, we could have taken a recognisance; but we cannot now do it.

Skin. 61, Mullineux's case.

If articles of the peace are exhibited in the Court of King's Bench, and oath be made that the party does not crave the surety of the peace from hatred or malice, but for the safety of his person, an attachment of the peace issues, directed to the sheriff, commanding him to take a bond for

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the appearance of the party in the Court of King's Bench, at the return of the attachment, to put in bail to the articles, and, if such bond be not given, to commit the party to the next jail.

Comb. 427, Russel's case; Fitzh. N. B. 79.

It is a great hardship that it should be in the power of one person to compel another, who lives in a very remote part of England, to appear and enter into a recognisance in the Court of King's Bench, when he might have had the surety of the peace from a neighbouring justice; and it seems to have been the opinion of the Court of King's Bench, some years ago, that a stop ought to be put to this vexation.

Upon a motion on the behalf of Russel to exhibit articles of the peace against seven or eight persons who lived at Nottingham, Holt, C. J., said,—Then we shall give seven or eight persons the trouble to come up to this court to put in bail. Why did you not go to a justice of the peace in the county? The complainant answered, I could not have had justice there: they are relations. Hereupon the motion was granted, *sed hæsitanter*.

Comb. 427, Russel's case, Trin. 9 W. 3.

In a late case, wherein the Court of King's Bench was moved on the behalf of Borough for leave to exhibit articles of the peace against Wait, leave was unanimously refused; it appearing that Wait lived at the Devizes, and that Borough had not endeavoured to obtain the surety of the peace in the county wherein Wait lived; and by Lord Mansfield, C. J.—Apply to the magistrates of the county, and if surety of the peace be not granted, come here again.

MS. Rep. Borough's case, East. 32 G. 2; [2 Burr. 780, S. C.]

When the party against whom articles of the peace are exhibited comes into court to put in bail, the articles must be read to him.

6 Mod. 132, The Queen v. Lane.

Articles of the peace having been exhibited against Lord Vane, and process of the peace having issued, it was insisted, when he came to put in bail, that the facts charged in the articles were not a sufficient ground for granting surety of the peace; or, if sufficient, that the facts were false, and affidavits were offered to disprove them. The reading of the affidavits was opposed, and it was said, that the course of the court had always been to give such credit to the oath of the party as to order security: but it was admitted, that the court might review the articles, and hear any objection arising upon the face of them; and by the court—This is all we can do. The reading of affidavits to disprove the facts charged in the articles was never attempted before; and we must adhere to the course of the court, which is to take the articles to be true. Upon reviewing these articles, the court were of opinion, that the facts therein charged were a sufficient ground for granting surety of the peace.

Stra. 1202, Lord Vane's case; [2 Burr. 806.] || See a further report of this case from Mr. Ford's MS., 13 East, 171, *notâ*.||

Robert Parnel exhibited articles of the peace against Sir Thomas Allen, Bart., and three others; and an attachment of the peace issued against them. Before a recognisance was entered into, Parnel presented a petition, in which he recited some of the facts sworn to in the articles, and endeavoured to explain them. Hereupon the counsel for the defendants moved for a rule to review the articles, and some affidavits were read to contradict the facts therein charged. Upon reading this petition and the

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affidavits, in which the facts were flatly contradicted by five or six persons, a rule was made to show cause why the articles should not be reviewed, and that Parnel should attend, upon the day for showing cause. He did attend, and the court was, upon the whole, so satisfied of his having been guilty of perjury, that he was immediately committed for wilful and corrupt perjury; and a rule was made that all further proceedings upon the articles should stay. The rule was pronounced in these terms, and not to take the articles off the file, in order to give the defendants an opportunity of prosecuting Parnel for perjury, which could not otherwise have been done.

MS. Rep. *Rex v. Sir Thomas Allen, Bart., and others*, Hil. 32 G. 2; [2 Burr. 806, S. C.]

Articles of the peace having been exhibited by John Brown against Hannah Bennett and three others, a rule was made, upon reading the affidavits of the defendants, to show cause why the articles should not be reviewed. It was sworn in the affidavits, that the defendants did not know such a person as Brown the articulant; and, besides other strong facts sworn to, it was suggested, that the exhibiting of the articles was a fresh contrivance of the defendant Bennett's husband to oppress her. No cause being shown, the articles were ordered to be taken off the file.

MS. Rep. *Rex v. Bennett and others*, East. 32 G. 2.

||But in a subsequent case, in which the two last cases were cited, the Court of King's Bench decided that the facts sworn to in the articles of the peace cannot be controverted by affidavits, and so it was decided in the time of Lord Hardwicke.

Rex v. Doherty, 13 East, 171; *Rex v. Bringloe*, Ibid. 174, *notâ*; and see Lord Vane's ca., Ibid. 171, *notâ*.||

Upon a motion for a *mandamus* to three justices of the peace in the county of Brecon, to take security upon articles of the peace exhibited in the Court of King's Bench, an affidavit was produced, in which it was sworn that the defendant, who lived in that county, was seventy years of age, and so infirm as to be unable to travel; and Seymour's case, M. 6 Ann. was cited. A *mandamus* was awarded.

Stra. 835, *Rex v. Lewis*.

Upon a rule to show cause why a *mandamus* should not be awarded to two justices of the peace in the country, to take a recognisance for keeping the peace, it appeared, that articles of the peace had been exhibited in the Court of King's Bench; that the defendant was in prison; and that he was so poor as not to be able to be at the expense of a *habeas corpus* for bringing him up to the court; the rule was discharged; and by the court—It has always been doubted, whether a recognisance for keeping the peace can be taken by justices of the peace upon articles of the peace exhibited in this court. There has been only one instance, of late years, wherein a *mandamus* for taking such recognisance has been awarded; and in that case, which was the case of *Rex v. Lewis*, Trin. 3 G. 2, there were very particular circumstances; namely, that the defendant was seventy years of age, and that he was so infirm as not to be able to travel.

Sayer, 252, *Rex v. Hellier*.

[Upon a woman's offering to exhibit articles of the peace against two persons, it appeared that the facts charged were done at Portsmouth. Upon which the court objected to her, that she ought to have applied to a

(G) The Manner of granting Surety of the Peace by a Justice of the Peace.

justice of peace in the neighbourhood. It was answered, that if there should be any particular inconvenience arising therefrom, there might be a *mandamus* to a justice of peace in the county, empowering him to take the security there. The court, however, came to this expedient, viz., that on issuing the attachment of the peace, which is of course made out upon the court's receiving the articles praying security of the peace, an endorsement should be at the same time made thereon, authorizing and directing any justice or justices of the peace in the county of Southampton to take the security of the peace there; specifying the particular sums wherein the principals and also their sureties should be bound.

Margaret Hutt's case, 2 Burr. 1039.]

If, after surety of the peace has been granted by the Court of King's Bench, a writ of *supersedeas* come from the Court of Chancery to the justices of the Court of King's Bench, their power is at an end; and the party is, as to the recognisance in this court, discharged.

Bro. *Peace*, pl. 17.

||On articles of the peace exhibited, the Court of King's Bench have the power of requiring bail for such a length of time as they shall think necessary for the preservation of the peace, and are not confined to a twelve-month.

Rex v. Bowes, 1 Term R. 696.||

(G) The Manner of granting Surety of the Peace by a Justice of the Peace.

A JUSTICE of the peace is empowered, by the commission of the peace, "To cause to come before him all those, who to any one or more of our people concerning their bodies or the firing of their houses have used threats, to find sufficient security for the peace or their good behaviour towards us and our people; and if they shall refuse to find such security, then them in our prisons, until they shall find such security, to cause to be safely kept."

Lamb. 36.

If oath be made before a justice of the peace, by one person, of his fearing that another person will burn his house, or do or procure to be done to him some corporal hurt, and that he does not crave the surety of the peace from malice, but for the safety of his person, the justice is bound to grant him the surety of the peace.

Lamb. 83; Fitzh. N. B. 79; 1 Hawk. c. 60, § 6.

A justice of the peace may grant surety of the peace against a peer; but it is said to be the safer way, to apply to the Court of Chancery, or the Court of King's Bench.

1 Hawk. c. 60, § 5; Lamb. 81. [A peer or peeress cannot be bound over in any other place than the courts of King's Bench or Chancery. 4 Bl. Comm. 253.]

It is said that, if the person against whom surety of the peace is craved be present, the justice of the peace may commit him immediately, unless he offer security for keeping the peace; and *à fortiori* that he may be required to find security, and be committed for not finding it.

Bro. *Main. pr.* pl. 39; 1 Hawk. c. 60, § 9.

But it was, in a very late case, laid down by Pratt, C. J., that no person ought to be committed by a justice of the peace for not finding security

(G) The Manner of granting Surety of the Peace by a Justice of the Peace.

for keeping the peace, until he has been required to find security, and has refused or neglected to do it.

MS. Rep. Wilkes's case, East. 3 G. 3, in C. B.

If the person against whom surety of the peace is craved be absent, a warrant for committing him cannot be granted until a warrant has been granted commanding him to find security for keeping the peace; and the warrant, which must be under seal, ought to show the cause for which, and upon whose complaint it was granted.

Lamb. 85; 1 Hawk. c. 60, § 12.

The justice of the peace who grants a warrant commanding a person to find security for keeping the peace, may make the warrant special for bringing the person before himself only; for, as he has most knowledge of the matter, he is best qualified to do justice therein.

5 Rep. 59, Foster's case; 1 Hawk. c. 60, § 13.

If a warrant commanding a person to find security for keeping the peace be general, the officer who executes it has an election to carry the person before what justice he pleases, and may carry him to jail under the same warrant, if he refuse to find security for keeping the peace before such justice; for the warrant has these words in it, *if he shall refuse to find security*.

Bro. *False Impris.* pl. 11; 5 Rep. 59; 1 Hawk. Ibid.

If a person, who is under an apprehension that surety of the peace will be craved against him, give security for keeping the peace before a justice of the peace, either before or after a warrant is granted against him, he may have an order of *supersedeas* from the justice; and this shall prevent or discharge him from an arrest under the warrant of any other justice of the peace.

Lamb. 95, 96, 99; 1 Hawk. c. 60, § 14.

A writ of *supersedeas* might heretofore have been had, as a thing of course, to a warrant of a justice of the peace, commanding a person to find security for keeping the peace. [But this is now varied by the 21 Jac. 1, c. 8, § 3, *quoad* vide *suprà*, tit. "SUPERSEDEAS," (C).]

Fitzh. N. B. 238.

A recognisance for keeping the peace is to be regulated, as to the number and sufficiency of the sureties, the largeness of the sum it is to be taken in, and the time it is to continue in force, at the discretion of the justice of the peace by whom it is taken.

Lamb. 100; 1 Hawk. c. 60, § 15.

It is said that a recognisance taken by a justice of the peace for keeping the peace as to A B for a year, or for the life of A B, without expressing any certain time, which shall be intended to be for the life of A B, although no time or place be fixed for the appearance of the recognisor, or he be not bound to keep the peace as to all the king's liege people, is good.

1 Hawk. c. 60, § 15; Lamb. 100.

But it is the safer way, to bind the recognisor to appear at the next sessions of the peace, and in the mean time to keep the peace as to all the king's liege people, and especially as to the party who craved the surety of the peace.

Lamb. 103; 1 Hawk. c. 60, § 16.

(H) Where a Recognisance for keeping the Peace is forfeited.

||However, it is settled that a justice of the peace is authorized to require surety of the peace for a limited time, according to his discretion, and is not obliged to bind the party over to appear at the next sessions.

Willes v. Bridger, 2 Barn. & A. 278.||

By the 3 Hen. 7, c. 1, it is enacted, "That every justice of the peace within this realm that shall take any recognisance for keeping the peace, shall certify, send, or bring the recognisance at the next sessions of the peace where he is or hath been justice, that the party so bound may be called."

If one of the sureties in a recognisance for keeping the peace die, the recognisor is not obliged to find a new surety; the executors and administrators of the dead person being bound by the recognisance.

Lamb. 113; Bro. *Peace*, pl. 17; 1 Hawk. c. 60, § 17.

§ A justice of the peace, before whom a person is brought lawfully charged with keeping a bawdy-house, may require such person to give sureties to keep the peace and be of good behaviour.

Darling v. Hubbell, 9 Conn. 350.¶

(H) In what Cases a Recognisance for keeping the Peace is forfeited.

By the 3 Hen. 7, c. 1, it is enacted, "That if the party, who is called at a session of the peace upon a recognisance for keeping the peace, make default, the default shall be there recorded, and the recognisance, with the record of the default, shall be sent and certified into the Chancery, or afore the king in his Bench, or into the king's Exchequer."

He who is bound to keep the peace, and to appear at a session of the peace, must appear and record his appearance, otherwise his recognisance is forfeited; and although the party who craved the surety of the peace come not to pray that it may be continued, the justices may, at their discretion, order it to be continued till another session of the peace.

Bro. *Peace*, pl. 17; Lamb. 109.

But, if an excuse, which is by the court judged to be reasonable, be given for the non-appearance of the recognisor, the court is not bound to record his default, but may discharge the recognisance, or respite it till the next sessions of the peace.

1 Hawk. c. 60, § 18.

A recognisance for keeping the peace is forfeited by the doing of violence to any person, whether it be done by the party bound, or by any other by his procurement.

Lamb. 115, 127; Bro. *Peace*, pl. 20; 1 Hawk. c. 60, § 20.

Upon a rule to show cause why the proceedings upon a *scire facias* should not be stayed, it appeared that the *scire facias* was brought upon a recognisance entered into by Stanley and his bail, for Stanley's keeping the peace as to all the king's subjects; that the recognisance was entered into in consequence of articles of peace exhibited by J S against Stanley; and that Stanley had been guilty of assaulting J N. The rule was discharged; and by Rider, C. J.—If the peace have not been broken by an assault upon the person who exhibited articles of the peace, the court will not permit a proceeding by *scire facias* upon the recognisance entered into for keeping the peace, in case the proceeding appear clearly to be vexatious: but, if the recognisance be for keeping the peace as to all the

(H) Where a Recognisance for keeping the Peace is forfeited.

king's subjects, as well as to the person who exhibited the articles, the court will not, in a doubtful case, stay the proceedings upon a *scire facias*; because the question, whether the breach of the peace by assaulting another person did amount to a forfeiture of the recognisance, may be determined upon the plea of not guilty to the *scire facias*.

Sayer, 139, Rex v. Stanley and his bail.

A recognisance for keeping the peace is not forfeited where an officer, having a warrant to arrest a person who will not suffer himself to be arrested, beats or wounds him in an attempt to arrest him.

Lamb. 128; 1 Hawk. c. 60, § 23.

If a parent, in a reasonable manner, chastise his child; a master his servant; a schoolmaster his scholar; a jailer his prisoner; or a husband his wife, neither of these is a forfeiture of a recognisance for keeping the peace.

1 Sid. 176, 177; Lamb. 127, 128; Hetl. 140, 150; 1 Hawk. c. 60, § 23; Fitzh. N. B. 80.

And, without enumerating all the assaults which one person may make upon another, without forfeiting a recognisance for keeping the peace, it may, in the general, be said, that the recognisance is not forfeited by any assault which could have been justified in an action or upon an indictment for the assault.

A recognisance for keeping the peace is forfeited by treason against the person of the king, or by any unlawful assembling *in terrorem populi*.

Lamb. 115; 1 Hawk. c. 60, § 21.

It has been holden that words which tend directly to a breach of the peace, as challenging a man to fight, or threatening to beat a person who is present, amount to a forfeiture of a recognisance for keeping the peace.

Lamb. 115; 1 Hawk. c. 60, § 21; Cro. Eliz. 86.

A recognisance for keeping the peace is forfeited by threatening to beat a person who is absent, if the person threatening afterwards lie in wait to beat the person threatened.

Lamb. 115.

A recognisance for keeping the peace is not forfeited by words of heat, as calling a person knave, liar, or rascal: for although such words may provoke a hasty person to break the peace, they have not a direct tendency thereto, nor does it appear that the speaker intended to carry his resentment any further.

Cro. Car. 498, Rex v. Heyward and his bail; 1 Hawk. c. 60, § 22.

Nay, it has been holden, that a recognisance for being of good behaviour is not forfeited by such words; and *a fortiori* a recognisance for keeping the peace is not.

Cro. Eliz. 86, King's case; Mo. 249; 1 Hawk. c. 60, § 22.

A recognisance for keeping the peace is not forfeited by a trespass upon the lands or goods of any person, unless it be committed with actual force.

Cro. Ja. 498; 1 Hawk. c. 60, § 25.

Nor is it forfeited by hurting a person in playing at cudgels or such like sport, by consent; inasmuch as such sports, which tend to promote activity and courage, are lawful.

Dalt. 284; 1 Hawk. c. 60, § 26.

(I) Cases where Recognisance may be discharged.

But a recognisance for keeping the peace is forfeited by wounding a person in fighting with naked swords; because no consent can make so dangerous a thing lawful.

Bro. Car. 229; 1 Hawk. c. 60, § 26.

If a soldier hurt a person by discharging his gun in exercising, without sufficient caution, it is not a forfeiture of a recognisance for keeping the peace; for although the soldier would be liable to an action for the damage sustained, this is not such a wilful breach of the peace as is within the meaning of the recognisance.

1 Hawk. c. 60, § 27; Hob. 134; 2 Roll. Abr. 548.

A court of quarter-session cannot proceed against a person for the forfeiture of a recognisance for keeping the peace; but the recognisance must be sent into one of the king's courts of record at Westminster.

1 Hawk. c. 60, § 18.

Advantage of a forfeited recognisance must be taken by *scire facias*, and not by indictment.

1 Roll. Abr. 900, Perrow's case; Cro. Ja. 598; 1 Hawk. c. 60, § 18.

(I) In what Cases a Recognisance for keeping the Peace may be discharged.

If the person who has entered into a recognisance for keeping the peace die, the recognisance may be discharged, if it were not forfeited before.

Sav. 53, Halfhide's case.

If the person who has craved the surety of the peace die, the recognisance may be discharged.

1 Lev. 235.

A release from the person upon whose complaint it was entered into, is not a discharge of a recognisance for keeping the peace; for, as the recognisance was entered into to the king, it is not in the power of that person to discharge it.

Bro. *Peace*, pl. 17; Lamb. 111.

A recognisance being entered into by a husband, upon articles exhibited in the Court of King's Bench by his wife to keep the peace for a year; a motion was made to discharge the recognisance, upon a suggestion that the wife consented thereto. No rule was made; and by Holt, C. J.—How can we discharge a recognisance before the condition thereof is performed?

11 Mod. 109, the Queen v. Lord George Howard.

A release, however, from the person upon whose complaint a recognisance for keeping the peace was entered into, may, if no time for its continuance is mentioned in the recognisance, be an inducement to the court to discharge it.

1 Hawk. c. 60, § 17; 11 Mod. 109.

The demise of the king is a discharge of a recognisance for keeping the peace; for as the condition is *servare pacem nostram*, his successor cannot take advantage of a breach.

Bro. *Peace*, pl. 15; 1 Hawk. c. 60, § 17.

After the condition of a recognisance for keeping the peace is broken, the king may pardon the forfeiture: but the king cannot release the condi-

(1) Cases where Recognisance may be discharged.

tion before it is broken ; inasmuch as the person, upon whose complaint the recognisance was entered into, has an interest in the condition.

Bro. *Recogn.* pl. 22 ; Bro. *Chart. de Pard.* pl. 24 ; 1 Hawk. c. 60, § 17 ; 2 Hawk. c. 57, § 24.

It has been holden, that if a recognisance for keeping the peace be removed by a writ of *certiorari*, the obligation to appear upon the recognisance is discharged.

2 Roll. Abr. 492, (F) pl. 1, pl. 2 ; Dalt. 278.

But this would be highly inconvenient ; and it seems to be the better opinion, that a writ of *certiorari* is no discharge of the obligation to appear upon a recognisance for keeping the peace.

Cro. Ja. 282, *Rosse v. Pye* ; Yelv. 207 ; 2 Hawk. c. 27, § 65.

If no time for the continuance of a recognisance for keeping the peace be mentioned, it is in the power of the court by which the recognisance was taken, or to which it has been certified, to discharge it at their discretion.

The practice of courts of quarter-sessions is, to continue a recognisance for keeping the peace from session to session until it be discharged.

The practice of the Court of King's Bench is, to continue the person bound to keep the peace upon his recognisance for twelve months ; and, if no indictment be within that time preferred against him, to discharge it at the expiration of that time.

12 Mod. 251, Anon. ; Stra. 835. [See *Rex v. Bowes*, 1 Term R. 696.]

This seems likewise to be the practice of the Court of Chancery ; for, upon a motion to discharge a writ of *supplicavit*, it was said by Lord Macclesfield, Chancellor—The application is too early : let the party stay until a year is expired, and, in the mean time, let him take care to behave himself peaceably.

2 P. Wms. 202, *Clavering's case*. [See too *Ex parte Sir Richard Grosvenor*, 3 P. Wms. c. 140 ; *Baynum v. Baynum*, Ambl. 63 ; *Ex parte King*, Ibid. 333.]

[A motion was made on the part of the husband to discharge an order for a *supplicavit* on the part of the wife. It was made on affidavits ; and the case was said to be more proper for the interposition of friends than a court of justice. Lord Hardwicke—I think so too : but when it does come before a court of justice, the court must go according to its rules. I never knew a writ of *supplicavit* or rules for surety of the peace in B. R. discharged, unless it has appeared to be a mere contrivance and falsity ; and then in a particular instance, (or two, I believe,) I have known them discharged. The reason is, that they are for prevention : if, therefore, the parties conclude they believe their lives to be in danger, the court will not try these facts upon affidavits on both sides. It must therefore be some strong case to show that it was a mere contrivance or falsity that will be a ground to discharge a writ of *supplicavit* or rule of surety of the peace. But here the facts are not at all denied, and I am to take care of the person who swears her life is in danger. I cannot discharge this order.

King v. King, 2 Ves. 578 ; Ambl. 240. Vide 3 Burr. 1922.]

SURETY OF THE GOOD BEHAVIOUR.

SURETY of the good behaviour is a recognisance entered into to the king for being of good behaviour.

A recognisance for being of good behaviour in so many respects resembles a recognisance for keeping the peace, that the going into the particular consideration thereof would be little more than a repetition of what has been said under the title "SURETY OF THE PEACE."

But as surety of the good behaviour may be granted in some cases where surety of the peace cannot; and as a recognisance for being of good behaviour may be more easily forfeited than a recognisance for keeping the peace, it will be proper to show—

- (A) In what Cases Surety of the good Behaviour may be granted, where Surety of the Peace ought not to be granted.
 - (B) What is a Forfeiture of a Recognisance for being of good Behaviour, which would not have been so of a Recognisance for keeping the Peace.
-

- (A) In what Cases Surety of the good Behaviour may be granted, where Surety of the Peace ought not to be granted.

By the 34 E. 3, c. 1, justices of the peace are empowered "to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprize towards the king and his people."

It is laid down, that the words in the 34 E. 3, c. 1, *them that be not of good fame*, extend only to such persons as are justly suspected of having formed a design to break the peace.

4 Inst. 181; 2 H. 7, 2 b, 3 a.

This construction seems too narrow: for the words *them that be not of good fame* do, in the usual acceptation of them, as well extend to persons of a scandalous behaviour in other respects, as to those who give just cause of suspicion that they intend to break the peace.

Lamb. 115, 116, 117; 1 Hawk. c. 61, § 2.

A good deal is, by the words *them that be not of good fame*, which are words of great latitude, left to the discretion of justices of the peace: but it is laid down, that they have power to demand surety of the good behaviour of those who sleep in the day and go abroad in the night; of such as keep suspicious company; of such as are generally suspected of being robbers; of eaves-droppers; of common drunkards; and of all others, whose misbehaviour may be reasonably intended to bring them within the meaning of the statute.

Lamb. 117; 2 Roll. Rep. 199, 227; Palm. 126; 1 Hawk. c. 61, § 2.

The author of an obscene book is liable to be bound to be of good behaviour, as a person not of good fame.

1 Hawk. c. 73, § 9.

Surety of the good behaviour may be demanded of a person who haunts

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(A) In what Cases Surety of good Behaviour granted.

bawdy-houses; and of a person who keeps women of bad fame in his house; and of all lewd persons.

Lamb. 119; 12 Mod. 566; Crompt. 140, 142; 1 Hawk. c. 61, § 2.

If a person, who has no visible means to enable him so to do, live at an extravagant rate, he may be compelled to find surety of the good behaviour.

12 Mod. 566, Claxton's case. ¶This was not the point decided, but a dictum of Lord Holt; and his language hardly amounts to the proposition in the text, which seems very questionable.¶

If a person have been guilty of exciting the people to disobedience to the law, he may be compelled to find surety of the good behaviour.

2 Vent. 22, 23, 24, Rudyard's case.

If one person lie in wait to hinder another from coming to a court of justice, surety of the good behaviour may be demanded of him.

2 Lill. Pr. Reg. 649.

If J S offer a woman money to buy medicines, to destroy a child of which she is pregnant, he may be compelled to find surety of the good behaviour.

Cro. Eliz. 449, Cockain v. Whitman.

Surety of the good behaviour is by divers statutes directed to be taken of the offenders against those statutes: as by the 1 M. st. 2, c. 3, of persons who have been guilty of disturbing any licensed preacher.

By the 5 Eliz. c. 21, of persons who have been guilty of unlawful fishing or hunting.

By the 23 Eliz. c. 1, of persons who neglect to come to church for the space of one month.

By the 1 Jac. 1, c. 13, of persons who have been guilty of unlawful hunting, or of stealing deer or conies.

A justice of the peace cannot however compel a person to find surety of the good behaviour upon a general information.

Styles, 16, Broker's case.

Surety of the good behaviour may be granted for words which tend to disturb or deter an inferior officer of justice, as a constable, in the execution of his office.

Cro. Car. 469, Rex v. Heyward; 2 Roll. Rep. 228; Palm. 127; 1 Ventr. 16; 1 Hawk. c. 61, § 3.

It may likewise be granted for words of contempt spoken to an inferior magistrate, as a justice of the peace or a mayor, although he be not in the actual execution of his office.

Cro. Eliz. 78, Simons v. Sweet; 1 Hawk. c. 61, § 3; 1 Lev. 52, 53.

But it ought not to be granted for calling a person rascal, knave, liar, or drunkard; these being only words of heat.

2 Roll. Rep. 227; Palm. 130; Cro. Eliz. 86; 1 Hawk. c. 61, § 3.

If one man call another liar in Westminster-hall, or before any great concourse of people, he is liable to be bound to be of good behaviour.

2 Lev. 107, Collins v. Man; 7 Mod. 29.

{It seems that, in Pennsylvania, surety for the good behaviour *may* be exacted from a *libeller* before conviction. But it is not proper to demand it, except under very extraordinary circumstances. And it is most agreeable to the spirit of the Constitution, and most conducive to the suppression

(B) What is a Forfeiture of a Recognisance, &c.

of libels, to adopt it as a general rule, not to demand such surety before conviction.

1 Bin. 98, n., *Commonwealth v. Duane*. See 1 Wils. 29, *Rex v. Shuckburgh*.}

A woman may demand surety of the good behaviour against her husband, if he be guilty of ill usage to her.

2 Vent. 345, *Smithson's case*.

If a person have been convicted of a misdemeanor, it is usually part of the judgment that he shall find security for his good behaviour for some time.

(B) What is a Forfeiture of a Recognisance for being of good Behaviour, which would not have been so of a Recognisance for keeping the Peace.

It is laid down, that the doing of a thing for which the doer might be compelled to find surety of the good behaviour, is a forfeiture of a recognisance for being of good behaviour.

Palm. 129, *Stamp v. Hyde*.

But this is denied to be law; and it seems to be very unreasonable. The good of the public may make it proper, in some cases, to compel a suspected person to enter into a recognisance for being of good behaviour: but it would be extremely hard that the recognisance should be forfeited before he has been guilty of misbehaviour.

Cro. Car. 449, *Rex v. Heyward*; 1 Hawk. c. 61, § 5.

A recognisance for being of good behaviour is forfeited by the speaking of seditious words.

Palm. 129, *Stamp v. Hyde*; Cro. Car. 499; 1 Hawk. c. 61, § 6.

A recognisance for keeping the peace is not forfeited by threatening words, unless the party threatened be present: but a recognisance for being of good behaviour is forfeited by such words, although the party concerning whom they were spoken be not present.

2 Roll. Rep. 199, *Stamp v. Hyde*.

A recognisance for being of good behaviour is not, in the general, forfeited by words of heat, as calling a person knave, rascal, liar, or drunkard.

Cro. Eliz. 86, *King's case*; Mo. 249.

But, if words of heat are spoken to a justice of the peace in the execution of his office, this is such misbehaviour as amounts to a forfeiture of a recognisance for being of good behaviour; for the public good requires that magistrates should be treated with respect.

2 Roll. Rep. 150, 228; Palm. 130.

A recognisance for being of good behaviour is forfeited by the recognisor's having a number of armed attendants, although he have not been guilty of a breach of the peace.

Lamb. 116; 2 H. 7, 2 b.

If a person who is under a recognisance for being of good behaviour is arrested upon suspicion of felony, and afterwards escape, it is a forfeiture of the recognisance; and by the court—Although the arrest was tortious, no felony having been committed, the recognisance is forfeited by the escape, which is a misbehaviour; it being the duty of every person to stand to the law, and answer to every thing he is charged with.

2 Leon. 166, *Crabdell's case*; Godb. 622.

When a recognisance for being of good behaviour is, pursuant to the

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Tender and Bringing Money into Court upon the Common Rule.

direction of a statute, entered into by a person who has done something prohibited by the statute, the being afterwards guilty of another offence against the statute is a forfeiture of the recognisance.

Lamb. 118.

In a *scire facias*, upon a recognisance for being of good behaviour, the breach assigned was, that the recognisor had assaulted and beat J. S., but it not being charged that the assault and beating were *vi et armis*, judgment was arrested.

Cro. Ja. 412, Rex v. Hutchins.

TENDER AND BRINGING MONEY INTO COURT UPON THE COMMON RULE.

A TENDER is an offer to pay a debt or to perform a duty.

Bringing money into court is depositing money in court, for the satisfaction of a debt or duty.

Wherever a tender of money is pleaded, and the debt is not discharged by the tender and a refusal, money may be brought into court without leave of the court: nay, the money tendered must, as hereafter will be shown, in such case be brought into court.

In all other cases leave of the court must be had, before money can be brought into court.

The rule, under which leave to bring money into court is granted, is, in some cases, as in the case of an ejectment by a mortgagee, founded upon a particular act of parliament.

This rule is, in other cases, founded upon the discretionary power of the court.

By the latter rule it is sometimes ordered, that, upon bringing money into court, the proceedings in the action shall be stayed.

At other times it is ordered, that the money brought into court shall be stricken out of the declaration; and that the plaintiff shall not, at the trial of the issue, be permitted to give evidence for the said money.

The rule by which the money brought into court is ordered to be stricken out of a declaration is, from its being more frequently granted than that by which it is ordered that the proceedings in the action shall be stayed, called the common rule.

As the common rule, which was introduced to supply the defect of having made a tender, is the only one which is connected with a tender, it is not intended to treat professedly, under this title, of any other rule for bringing money into court.

By reason of the connection between making a tender and bringing money into court upon the common rule, it has been thought proper to treat of these two things under the same title: yet the design is, that each shall, as far as it can conveniently be done, have a distinct consideration.

(A) By whom a Tender may be made.

Under this title it will be proper to show,

- (A) By whom a Tender may be made.
- (B) What is a good Tender.
 - 1. *As to the manner of tendering.*
 - 2. *As to the thing tendered.*
- (C) At what Place a Tender must be made.
- (D) At what Time a Tender must be made.
- (E) To whom a Tender must be made.
- (F) The Consequences of a Tender and Refusal.
- (G) The Consequences of being ready to tender, when the Party, to whom it was intended to have been made, was not present.
- (H) Of Pleading a Tender.
 - 1. *In the General.*
 - 2. *Where Uncore prist is pleaded.*
 - 3. *Where Uncore prist together with Tout temps prist is pleaded.*
 - 4. *Where a Profert in Curia is pleaded.*
- (I) The Consequences of a *Profert in Curia*.
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- (P) Of tendering or bringing Money into Court upon the common Rule, in particular Actions.
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 - 6. *In an Action against a Justice of the Peace on the Account of something done in the Execution of his Office.*
 - 7. *In an Action of Replevin.*
 - 8. *In an Action of Trespass.*
 - 9. *In an Action of Trover.*
- β (Q) Of Tender of Amends. §

(A) By whom a Tender may be made.

WHEREVER the right of tendering is personal, the tender must be made by the party himself.

7 Rep. 13; 1 Inst. 208.

A tenant who is liable to a writ of *cessavit* must, if he would prevent the lord from recovering the land, personally tender the rent which is in arrear.

Bro. *Tend.* pl. 29; Term. de Ley, 102.

If a feoffment be made, with condition that *if the feoffor pay a sum of money to the feoffee* it shall be lawful for the feoffor and his heirs to enter, and the feoffor die before the money is paid, no tender can be made by his

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Tender and Bringing Money into Court upon the Common Rule.

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(A) By whom a Tender may be made.

heir; for the right of tendering is in this case as much personal as if the words had been, *if the feoffor during his life pay the money*.

1 Inst. 208.

But a tender made by a servant, or by a stranger, on the behalf and at the desire of a party, is as good, notwithstanding the right of tendering be personal, as if it had been made by the party himself.

Cro. Eliz. 48, *Crop v. Hambleton*.

Wherever the right of tendering is not personal, a tender may be made by any person who is a privy to the party in whom the right of tendering is.

Latch, 107; 7 Rep. 13; 1 Inst. 206, 207, 208.

If a feoffment be made, with condition, that if the feoffor pay a sum of money to the feoffee on a day certain, it shall be lawful for the feoffor and his heirs to enter, and the feoffor die before the day, a tender may be made at the day, either by the heir of the feoffor as a privy in blood, or by his executor as a privy in representation; the right of tendering not being in this case personal.

1 Inst. 206, 208, 209; 4 Rep. 123.

A testator, after devising land to his wife for life, devised the remainder to Daniel his second son in fee: provided, nevertheless, that if Nathaniel his third son should, within three months after the death of the testator's wife, pay the sum of 500*l.* to Daniel, his executors or administrators, that Nathaniel and his heirs should have the land. As Nathaniel, who survived the testator, died during the life of the testator's wife, a question arose, Whether the heir of Nathaniel should, on the payment or tender of the money within the time limited, be entitled to the land? The opinion of Parker, Chancellor, and Jekyll, Master of the Rolls, who both considered it as a mere legal question, was, that the right of paying, or tendering the money was not, in this case, personal, and consequently that it descended upon the heir of Nathaniel.

10 Mod. 419, 424, 425, *Marks v. Marks*.

Wherever a grant is made of an estate, with condition to be void, upon tendering a certain thing therein mentioned by the grantor, a tender, if the right of making it be not personal, may be made by any person who becomes interested in the condition, although he be not a privy to the grantor.

1 Inst. 206, 207.

Sir Francis Englefield by indenture covenanted to stand seised of the manor of Englefield, to the use of himself for life, remainder to the use of Francis Englefield his nephew and the heirs of his body, remainder to the use of the right heirs of his said nephew, who at the time of making the deed was an infant. In the indenture it was afterwards said, that the covenant in favour of the nephew was not intended to be absolute during the life of Sir Francis; and with a view that the uncle might, if, as the nephew grew up, he should prove extravagant, or be addicted to any enormous vice, have a check upon him, it was provided, that if the uncle should, by himself, or by any other person, during his natural life, tender to the nephew a ring of gold, with an intent to make the use of the indenture void as to the nephew, that then the said use should be void. Sir Francis being afterwards attainted of high treason by act of parliament, and the manor being thereby forfeited to Queen Elizabeth, she authorized two persons to

(B) What is a good Tender.

tender a ring of gold to the nephew, with an intent to make the use of the indenture void as to the nephew. Upon this a question arose, Whether the use was by this tender made void? It was insisted, on the behalf of the nephew, that, as the substance of the condition, under which the said use might be made void, was to give Sir Francis an opportunity of declaring his intention, and the tender of the ring was only an outward ceremony for declaring such intention, the right of tendering the ring was so annexed to his person that it could not be transferred; that as the indenture was founded in natural love and affection, the uncle would, which no stranger could do, have exercised these in judging of the disposition of his nephew. It was moreover said, that, by the common law, the guardianship of an eldest son is so annexed to his father's person, that it can neither be transferred nor forfeited. But the whole court were of opinion, that the recital of the cause which might induce the uncle to reserve the power of tendering to himself, was only flourish or preamble, and not parcel of the condition, which consisted solely in the tender of the ring, and that this might be tendered, under the express words of the condition, by any other person as well as Sir Francis; and consequently that the right of tendering, it not being personal, was now devolved upon the crown.

7 Rep. 12, 13, *Englefield's case*. ||See *per* Lord Hale, 1 Hale, P. C. 245, and 4 Leon. 169; Latch, 25, 69, 102; 1 Jones, 134; Palm. 429; 2 Roll. 393, and 7 Co. Rep. 15 b, *in notis*, (ed. 1826.)||

It is in the general true, that a tender cannot be made by one who has no interest in the condition upon which the right of tendering is founded.

1 Inst. 207.

If the money due upon a mortgage of an infant's estate be tendered by a person who is neither guardian to the infant nor has any interest in the estate, the tender is void.

Cro. Eliz. 132, *Watkins v. Ashwicke*.

But any person may make a tender on the behalf of an idiot; for the law, by reason of his utter inability to act for himself, allows this to be done out of charity.

1 Inst. 206.

§ A tender of money made by an uncle, on behalf of an infant whose father was dead, but whose mother was living, is good, although the uncle had not been appointed guardian.

Brown v. Dysinger, 1 Rawle, 408.¶

(B) What is a good Tender.

1. *As to the Manner of tendering.*

A TENDER is not good unless the person making it declare upon what account it is made.

Latch, 70, *Warner v. Harding*.

It is not enough for the person who intends to make a tender to say, I am ready to pay the debt, or to perform the duty; but he must make an actual offer to pay the one, or to perform the other.

1 Leon. 71; 2 Lev. 209; 3 Lev. 104; 12 Mod. 353; {2 Dall. 190, *Sheredine v. Gaul*; Peake N. P. 88, *Black v. Smith*; 4 Esp. Rep. 68, *Dickinson v. Shee*; 5 Esp. Rep. 48, *Glasscott v. Day*; 4 Dall. 327, *Searight v. Calbraith*.} [However, the actual production of the money may be dispensed with by the conduct of the other party. 3 Term R. 83.] § The debtor must have the money with him in order to make a tender,

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though, if refused, it is not requisite that he should count it. *Breed v. Hurd*, 6 Pick. 356. See *Barker v. Parkenhorn*, 2 Wash. C. C. R. 142; *Searight v. Calbraith*, 4 Dall. 325. *g*

||The money must be actually produced at the time of tender, or the production must be dispensed with by the express declaration, or some equivalent act of the creditor.

Thomas v. Evans, 10 East, R. 101; *Read v. Golding*, 2 M. & S. 86; 4 Esp. N. P. C. 68, S. P.; *Bakeman v. Pooler*, 15 Wend. 637. *g*

It has been held, that if the defendant be willing to pay ten pounds, and a third person offer to go up stairs and fetch that sum, and is prevented by plaintiff saying, "he cannot take it," this is a good tender.

Harding v. Davis, 2 Carr. & P. Ca. 77. See 7 Moo. 59.

A tender of a larger sum, in coin of the realm, requiring change, has been held a good tender of a smaller sum; but it seems now settled otherwise.

Wade's case; 5 Co. 115 a; *sed vide Robinson v. Cook*, 6 Taunt. 336; *Brady v. Jones*, 2 Dow. & Ry. 305.

And a tender of a bank note for 5*l.*, desiring the creditor to take 3*l.* 10*s.*, is clearly not a good tender.

Betterbee v. Davis, 3 Camp. 70.

But a tender of a larger sum requiring change is good, if the plaintiff objects only on the ground that he is entitled to more, and not because he has not change.

Cadman v. Lubbock, 5 Dow. & Ry. 289; and see 1 Gow's Ca. 111; *Peake's Ca.* 179. || It is no objection to a tender in specie that it be for too much; otherwise, it seems, if the tender be in bank notes. *Hubbard v. Chenango Bank*, 8 Cowen, 88. *g*

The mortgagor said to the mortgagee, I am here ready to pay you the money due upon the mortgage; but at the same time kept the money, which was in a bag, under his arm. This was holden not to be a good tender.

Noy, 74, *Suckling v. Coney*.

But an actual offer of money in a bag is a good tender, provided it be proved that the sum intended to be tendered was in the bag; for it is usual to carry money in a bag; and it is the duty of the party who receives it to tell it, and to examine whether it be good.

5 Rep. 115, *Wade's case*; 1 Inst. 208. [Vide 5 Term R. 432.]

A contracted to pay B ten thousand pounds, upon his transferring to A or his order one thousand pounds South Sea stock, at or before a certain time. B, before the time, made an actual transfer of the stock: but because A did not come or send a person to accept the stock, and pay for it, the transfer was afterwards vacated.

Stra. 777, *Duke of Rutland v. Hodgson*.

The transfer of the stock seems in this case to have been made *ex abundanti cautela*: for it has been holden that an actual transfer is not necessary to the making of a tender of stock good.

In an action of covenant the plaintiff declared, that the defendant had agreed to pay him two thousand pounds, upon his transferring to the defendant one thousand pounds Hudson's Bay stock; and the plaintiff averred that he offered to transfer the stock. It was holden that this, although there was not an actual transfer of the stock, was a tender sufficient to entitle the plaintiff to the money.

Lord Raym. 686; *Lancashire v. Killingworth*, 12 Mod. 530.

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[Upon an issue, whether stock were tendered at the day, the plaintiff proved, that though the books were not opened to make transfers in the common form, yet they were ready at the office, and, upon leave from a director, there might have been a transfer, it not being usual to deny it on such occasions; but, the defendant not attending to accept the stock, the plaintiff contented himself with staying there all day, and did not actually get leave from a director to have the books opened, if the defendant should come. And for this omission Lord Chief Justice Pratt ruled it not to be a sufficient tender, for there was a possibility that leave might not be given, and the plaintiff had not done every thing in his power: he ought to have so prepared matters that, if the defendant had appeared, there might have been a transfer immediately.]

Clark v. Tyson, 1 Stra. 504.

At the opening of the books, the two brokers met, and the selling broker told the other, he was ready to transfer; the other alleged, it was usual to indulge the buyer for two or three days, and that he would find his principal in that time, which the other not disagreeing to, nothing further was done. And for want of having the buyer called at the books the first day of the opening, the Lord Chief Justice Pratt ruled it not a good tender, and the plaintiff was nonsuited.

Thornton v. Moulton, 1 Stra. 533.

In a stock cause the plaintiff proved a tender on the second day of the opening, and would have examined into the custom of the Alley, which was, to allow either party a day or two to tender or accept; but the Chief Justice Pratt refused to admit such evidence, saying, their usage could never alter the law, and so the plaintiff was called. N. B. In C. B. Chief Justice King left it to the jury upon such an evidence; and they found it a good tender.

Bullock v. Noke, 1 Stra. 579.]

||A tender must be unconditional: therefore a tender accompanied with a demand of a receipt in full is bad; and so also is a tender on condition of the sum being received as the whole balance due.

5 Espin. N. P. C. 48; 2 Camp. N. P. C. 21; 4 Ibid. 156; 7 Dowl. & Ry. 119; 1 Carr. & P. Ca. 257, 419; 2 Ibid. 50; || β Wood v. Hitchcock, 20 Wend. 47; Thayer v. Brackett, 12 Mass. 450; Loring v. Cook, 3 Pick. 48. In Richardson v. Jackson, it was holden that the demand of a receipt at the time of tender did not invalidate it. γ

β On a tender and refusal on the ground that more was due, held that the creditor could not afterwards object that a receipt was required; and *quære*, if the latter would invalidate the tender?

Richardson v. Jackson, 8 Mees. & W. 298.

Where a check was sent in a letter requiring a receipt to be sent in return, which the plaintiff sent back, saying he would not receive it, and requested a check for a greater sum; held, not to be a conditional tender, and sufficient.

Jones v. Arthur, 8 Dowl. 442.

Where the sum tendered was offered to the creditor as "the amount of his bill," held not conditional, and that the plaintiff might have taken it and gone on for the rest of his demand.

Henwood v. Oliver, 1 Gale & D. 25. See Sutton v. Hawkins, 3 C. & P. 258.

Where the defendant's agent, having the money ready, said, "I am in-

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structed by the defendant to say that 15*l.* is more than is due, but you may have it," held, not conditional, but constituting a sufficient tender.

Thorpe v. Burgess, 8 Dowl. 603.

Where the sum tendered was as for a half year's rent, which the plaintiff's agent refused; held, to be a conditional tender, for, if taken, it would involve an admission of the amount of rent, and therefore bad.

Hastings v. Thorley, 8 C. & P. 573.

An allegation at the time of the tender, that it was all the debtor considered to be due, held not to make a conditional one, if otherwise good.

Robinson v. Ferreday, 8 C. & P. 753.

Where the defendant's attorney tendered a sum, saying, "I tender you £—— for your claim on M," which the plaintiff refused to accept in discharge of his bill; and the attorney again said, "I tender you £——;" held to be unconditional and sufficient.

Jennings v. Major, 8 P. & C. 62.

Where the words were, "I have called to tender £——, in settlement of R's bill," held, it was for the jury to say whether it was conditional or not.

Eckstein v. Reynolds, 2 Nev. & P. 256.

Where the sum offered was tendered as all that was due, held not a good tender, for, if accepted, the future claim to more would have been compromised, which could not be when the creditor takes a sum properly tendered.

Stutton v. Hawkins, 8 P. & C. 259.

Where the debtor asked how much was due, and laying down a sum exceeding what was due, desired the creditor to take what was due; held, that the offer not being coupled with any condition, the tender was good.

Bevan v. Rees, 7 Dowl. 510.*g*

|| Where a party has separate demands, for unequal sums, on several persons, an offer of one sum for the debts of all will not support a plea stating that a certain portion of the sum was tendered for the debt of one.

Strong v. Harvey, 3 Bing. R. 304.||

{If A be indebted to several persons in different sums of money, and when they are all assembled together, tenders them one gross sum sufficient to satisfy all their demands, which they refuse to receive, *insisting on more being due*, this is a good tender.

Peake, N. P. 88, Black v. Smith.}

β Tenders are *stricti juris*, and are never supplied by equity.

Arrowsmith v. Van Harlingen, Coxe, 26; Shotwell v. Denman, Coxe, 174.

If a debtor tell his creditor that he will pay him so much, and put his hand in his pocket to take out the money, but before he can get it out the creditor leaves the room, and, consequently, the money is not produced till he is gone, there is no tender.

Leatherdale v. Sweepstone, 3 Car. & P. 342.

In Indiana, when a tender is pleaded, the money must be brought into court.

Crawford v. Harvey, Blackf. 383. See Hay v. Ousterout, 3 Ohio, 385.*g*

2. As to the Thing tendered.

It was heretofore holden, that if a tender of rent in arrear is intended to

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be made, the whole rent, without deducting the land-tax, must be tendered.

Bro. *Tend.* pl. 39; 2 Lill. P. R. 688.

But in every land-tax act made for some years past, there is this clause, "The several and respective tenant and tenants of houses, lands, tenements, and hereditaments, in England, Wales, or Berwick-upon-Tweed, which shall be rated by virtue of this act, are hereby required and authorized to pay such sum or sums of money as shall be rated upon such houses, lands, tenements, and hereditaments, and to deduct out of the rents so much of the said rate, as in respect of the said rents of any such houses, lands, tenements, and hereditaments, the landlord should and ought to bear; and the said landlords, both mediate and immediate, according to their respective interests, are hereby required to allow such deductions and payments, upon receipt of the residue of the said rents."

30 G. 2, c. 3, § 15, 16. [Vide *Sapsford v. Fletcher*, 4 Term R. 511, *supra*, vol. viii. 574.] ¶ *Andrew v. Hancock*, 3 Moo. 278; *Stubbs v. Parsons*, 3 Barn. & A. 516.¶

If A be indebted to B in divers distinct sums of money, he may make a tender of any one of the sums.

Bro. *Tend.* pl. 39.

A tender of more money than is due is good for what is due: for *omne majus continet in se minus*; and it is at the peril of the person, to whom the tender is made, if he take more than his due.

5 Rep. 115, *Wade's case*, Stra. 916. [So it is good, though the money tendered be mixed with other moneys. 3 Term R. 683.] ¶ But not a tender of a larger sum requiring change. 6 Taunt. 336; 3 Camp. R. 70, *ante*, p. 314.¶

If the condition of a bond be, that the obligor shall at a day and place certain pay twenty pounds or deliver ten kine, at the then choice of the obligee, a tender must be both of the money and the kine.

1 Leon. 68, *Fordley's case*.

A tender in any money coined at the mint, upon which there is the king's stamp, is good; for all such money is current, in proportion to its value, without a proclamation.

Comb. 387, *Dixon v. Willoughs*, 1 Inst. 207; Salk. 446.

If a contract be to pay a hundred pounds in a foreign coin, a tender to the amount of this sum in any current coin of this kingdom is good.

Lat. 84, *Ward v. Bidgwin*.

If money be made current by proclamation at a higher rate than its intrinsic value, a tender in such money, according to its current value, is good.

Queen Elizabeth caused some mixed money to be coined at the mint, and sent it to Ireland, with a proclamation to be current there at a certain value; and by the same proclamation a stop was put to the currency of all other coins in that kingdom. It was holden, that a tender made in this money, according to its current value, was good.

Dav. 18, *The case of mixed money*.

If the money which has been tendered become, after a refusal to accept thereof, current at a less value than it was current at when the tender was made, the party who refused to accept the money must bear the loss.

In an action of debt for rent, the defendant pleaded a tender of the rent in pieces of English money, called shillings, every one of which was, at

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the time of the tender, current at the value of twelve pence, and that he is yet ready to pay the rent in the said pieces at that value. The plaintiff demurred, and for cause alleged, that before the bringing of the action, the said pieces of money were by proclamation made current only at the value of sixpence; but he afterwards thought proper to accept the money according to the value when the tender was made.

Dyer, 81, Barrington v. Potter; Dav. 27.

{ Where paper money was tendered, which afterwards ceased to be current, the plea ought to state specially the *sort of money* that was tendered, and that the defendant was always ready to pay *that very money*, which he brings into court. But if it allege a tender of money generally, the defendant must bring into court that which is *money at the time of the plea pleaded*. If he do not, the plaintiff may sign judgment.

1 Wash. 29, Downman v. Downman's Ex'rs. }

If a foreign coin be made current in this kingdom by proclamation, a tender in such money is good; for it thereby becomes lawful money of this kingdom.

5 Rep. 114, Wade's case; 1 Inst. 207.

If the money tendered has been accepted, the acceptor has no remedy, although some of it be counterfeit or deficient in value, or although there be not so much as it was tendered for: because it was his duty to have examined and told it before he accepted thereof.

1 Inst. 208.

The party, to whom some money was tendered, had accepted it, and put it into his purse: but upon examining it, before he left the place, he discovered some counterfeit pieces, and for this reason refused to carry it away. It was holden that, as he had not objected to the money before he did accept it, he could not do this afterwards.

5 Rep. 115. { Vide Shep. Touch. 140; 2 Johns. Rep. 459; 1 Mass. T. Rep. 66. }

A tender of a bank-note as money, is not, strictly speaking, a good tender: but if the tenderer offer to get money for the note, this makes it a good tender.

Eq. Cas. Abr. 319, Austin v. The Executors of Dodwell. [Although it hath never yet been determined that bank-notes are a legal tender, yet the Court of King's Bench have holden, that if such notes are presented in payment, and no objection is made to the receipt on that account, they are in that case a good tender. Wright v. Reed, 3 Term R. 554.] { See 2 Bos. & Pul. 526, Grigby v. Oakes. } || The bank acts did not render bank-notes a legal tender. Grigby v. Oakes, 2 Bos. & P. 526; and vide Tidd's Prac. 209, (7th edition;) and by stat. 56 G. 3, c. 68, § 11, gold coin is declared to be the only legal tender. A tender of a country bank-bill seems to be a good tender, if no objection be made to the form of tender. Peake, N. P. C. 180, n. By 59 G. 3, c. 49, the restrictions on payments in cash under the several bank acts finally determined on the 1st day of May, 1823; so that it is no longer necessary to negative a tender of the debt in bank-notes, in an affidavit to hold to bail.||

It seems reasonable that a tender of any sort of goods should, unless they are to be delivered according to some sample, be made in a middling kind of goods of the sort.

§ A tender made partly in silver coin and partly in bank-notes, which the party tendering offered to convert into silver, but the creditor refused to accept of any money, is good.

Brown v. Dysinger, 1 Rawle, 408.

A mere offer to pay money is not a legal tender.

Sheredine v. Gaul, 2 Dall. 190.

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Bank-notes are a legal tender, unless objected to at the time.

Towson v. Havre de Grace Bank, 6 Harr. & J. 53; *Warren v. Mains*, 7 Term Rep. 476; *Snow v. Perry*, 9 Pick. 539; *Bank of the United States v. The Bank of Georgia*, 10 Wheat. 333.

When the vendor of real estate tenders a deed, which the vendee considers not to be according to the contract of sale, he should prepare a deed in conformity to the contract, and present to the vendor to be executed, in order to put him in default.

Hackett v. Huson, 3 Wend. 249.

Where the defendant had given a promissory note payable in produce by a certain day at his house; in an action on the note, the defendant pleaded payment, and proved that he had hay in his barn, ready to be delivered on the day to the plaintiff, but did not show the quantity nor value; held that there was no proof of tender nor payment.

Newton v. Galbraith, 5 Johns. 119.

One who has agreed to pay a specific sum as the price of land, cannot be relieved from its payment by the tender of a less sum, agreed upon in the contract as specific damages, to be paid in case of the non-performance of the contract on his part.

Ayres v. Pease, 12 Wend. 393.

A tender of the sum justly due by the condition of a bond, after a breach, though less than the penalty, is sufficient.

Tracy v. Strong, 2 Conn. 659.

Treasury notes issued under the act of Congress of 1814, ch. 77, and 699, being by their terms receivable in payment of duties, taxes, and land debts due to the United States, are a good tender, and may be pleaded to such debts.

Thorndike v. United States, 2 Mason, 1.º

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If a contract be, that money in gross, or rent issuing out of land, shall be paid, or that goods shall be delivered, at a place certain, a tender can only be made at the place.

Bro. Tend. pl. 17; *Bro. Cond.* pl. 17; 1 Inst. 210; *Freem.* 149.

If no place be appointed for the payment of money in gross, a tender must, if the person to whom the money is due be in England, be made at the place where he is: but, if he be out of England, the party, who ought to pay the money, is not bound to go out of the realm to seek him.

Bro. Tend. pl. 17; 1 Inst. 210.

It was formerly holden, that the money due upon a mortgage, which is to be considered as money in gross, must, if no place be appointed for the payment thereof, be tendered to the person, if he be in England, at the place where he is.

1 Inst. 210.

But it has been holden in the Court of Chancery, that a tender to the person is not in such case necessary.

The mortgagor, after the mortgage was forfeited, went to the mortgagee's house with money sufficient to redeem the estate, and tendered it there: but it did not appear that the tender was to the mortgagee, or that he was in the house at the time. This was holden to be a good tender.

1 Chan. Ca. 29, *Manning v. Barges*.

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Personal notice was given to the mortgagee, the day before the twenty-fifth day of March, one thousand seven hundred and twenty-two, that the mortgagor would upon the twenty-fifth day of September following, between the hours of ten and twelve in the forenoon, tender the principal money, which was one thousand pounds, and all interest due thereupon, in Lincoln's-Inn Hall; and a tender was accordingly made. It was objected that, no place being appointed in the mortgage-deed for the payment of the money, the tender ought to have been made to the mortgagee in person: but the tender was holden to be good. And by Lord King, Chancellor—As the money was lent in town, and no objection was made by the mortgagee to the place, when notice of payment was given, it would be very hard to compel the mortgagor to travel with so great a sum of money to the place where the mortgagee lives.

2 P. Wms. 378, *Gyles v. Hall*.

If no place be appointed for the payment of rent issuing out of land, a tender upon the land is good; for it is not, in this case, necessary to make a tender to the person.

1 Inst. 210, 211; Bro. *Tend.* pl. 18, pl. 38.

But, although a tender to the person be not, in the case of rent issuing out of land, necessary, a tender to the person would, in such case, be good.

Cro. Eliz. 48, *Crop v. Hamilton*.

If a corporal service to the grantor be reserved in a grant of land, this must be tendered to the grantor in person; and the tenant must seek him, if he be in England.

1 Inst. 210, 211; Bro. *Tend.* pl. 17.

If no place be appointed for the delivery of heavy goods, the person whose duty it is to deliver them is not bound to tender them to the person to whom they ought to be delivered; for if he go to the person to inquire at what place he will receive them, and afterwards tender them at that place, this is a good tender.

1 Inst. 210.

{So if a man is to pay money or deliver property at a valuation, at his own election, he is not bound to carry the property to the creditor, but the latter should receive it at the debtor's house.

1 Wash. 326, *Dandridge v. Harris*.}

β When a contract is made in one state of the Union for the payment of money, the debtor is not bound to go to another state to tender the money to the creditor.

Allshouse v. Ramsay, 6 Whart. 331.

Though a tender of rent is good on the land, yet a personal tender is good off the land.

Hunter v. Le Conte, 6 Cowen, 728. See *Slingerland v. Morse*, 8 Johns. 476.

Upon a note payable in ponderous articles at a certain day, without specifying a place of payment, in order to make a tender, the promisor is bound to seek the promisee before the day, and know of him where he will have the articles delivered; and then, if he appoint a reasonable place, or such a one as might have been in contemplation of the parties when they contracted, offer the articles there.

Barnes v. Graham, 4 Cowen, 452. See *Coit v. Houston*, 3 Johns. Cas. 243; *Slingerland v. Morse*, 8 Johns. 474; *England v. Witherspoon*, 1 Hayw. 361.

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When the debt is a sum of money, the debtor is bound to seek the creditor wherever he may be within the state, unless a place of payment has been appointed.

Littell v. Nichol's Administrators, Hardin, 66; *Chambers v. Winn*, Pr. Dec. 193.

But when the party is bound to deliver property, and no place of delivery has been fixed by the parties, the place of residence of the debtor is the place where it must be tendered.

Grant v. Groshorn, Hardin, 85; Pr. Dec. 193; *Jacoby v. Schwartzwelder*, 1 Bibb, 430; *Galloway v. Smith*, Litt. Sel. Cas. 133.

Where one of the defendants makes a tender to the plaintiff (executor) while in another state and on other business, before he had acted or qualified to act as executor, a refusal to accept the money thus offered will not bar the recovery of interest.

Todd v. Mershon, Cox, 45.g

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A TENDER with costs may be made in a court of equity after a bill is filed.

Bunb. 28.

But a tender cannot be made after an action has commenced.

Bro. *Tend.* pl. 9; 21 Jac. c. 16, § 5.

In an action of trespass, the defendant pleaded, that he tendered amends before the action was commenced, to wit, on the second day of October. The plaintiff replied, that before the tender he had sued out a *latitat*, teste the last day of the preceding Trinity term, and had thereupon procured the defendant to be arrested. Upon a demurrer, this tender was holden to be void; for that a tender after the suing out of a *latitat*, as well as one after the suing out of an original writ, is void.

Cro. Car. 264, *Watts v. Baker*.

But where a tender has in fact been made before a writ was sued out, the court out of which the writ issued will, upon application, take care that the tender shall not be made void by the relation of the writ to a day anterior to the tender.

[See Tidd's Prac. 427, (9th ed.)]

The defendant pleaded a tender, upon the fourth day of May, *ante diem exhibitionis billæ*. The plaintiff replied, *non obtulit ante diem*; and, in order to oust the defendant of the benefit of the tender, made up the paper-book with a general *memorandum*. As by this means the writ would have related to the first day of the term, which was before the fourth day of May, the Court of King's Bench, upon an affidavit that the writ was not sued out till the sixth day of May, made a rule, that the plaintiff should make up the paper-book with a special *memorandum*, according to the truth of the fact.

Stra. 638, *Smith v. Key*; [1 Wils. 39, *Smith v. Raydon*, *semb.* S. C.]

A tender was pleaded to have been made upon the thirteenth day of January. The plaintiff replied an original teste the second day of January. Upon the application of the defendant, the Court of Chancery ordered the teste of the original to be altered from the second day of January, the common teste day of an original returnable on the octave of St. Hilary, to the

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sixteenth day of January, this being the day upon which the instructions for the original were left with the cursitor.

Barn. 357, Hill v. Williams.

||But an original sued out before the tender must be duly continued down, so as to connect itself with the process on which the defendant is brought into court, otherwise it is no answer to a plea of tender made subsequent to it.

Stratton v. Savignac, 3 Bos. & P. 330.||

[In the King's Bench, if the defendant has pleaded a tender before the exhibiting of the bill, though the plaintiff may reply a *latitat* previous to the tender, yet the defendant may rejoin, that there was no cause of action at the time when the *latitat* issued.

Wood v. Newton, 1 Wils. 141.]

||It is no answer to a plea of tender, that the plaintiff had previously employed an attorney, and instructed him to sue out a writ, and that the attorney had applied for the writ before the tender, and it was sued out afterwards.

Briggs v. Calverley, 8 Term R. 629; and see 3 Taunt. 840, 307.

{Nor is it a good answer that an original writ was sued out and returned before the tender, but not proceeded upon, and that then a second original was sued out and proceeded upon after the tender, if the first original does not appear to have been properly continued, and therefore cannot be connected with the second writ.

3 Bos. & Pul. 330, Stratton v. Seignac. Vide 1 Dall. 411, Schlosser v. Leshner.}

Where a tender has been made in term-time, and prior to the commencement of the action, and the declaration is of the same term, and entitled generally, as this refers to the first day of term the defendant cannot prove the tender on a day subsequent. In such case, the defendant should call upon the plaintiff to entitle his declaration specially of the day the suit was commenced, when it would appear to be subsequent to the tender.

4 Esp. Ca. 72. See Tidd's Prac. 427, (9th ed.)||

In the case of damage-feasant, a tender may be made before the beasts are distrained, or between the time of distraining and impounding them.

2 Inst. 107; 8 Rep. 147.

If the tender be made before the beasts are distrained, the distraining of them afterwards is unlawful.

Fitz. N. B. 69; 1 Inst. 107; 8 Rep. 147.

If it be made after the distress, but before the beasts are impounded, the impounding of them afterwards is unlawful.(a)

Fitz. N. B. 69; 1 Inst. 107; 8 Rep. 147. ||(a)But an action on the case does not lie in such case; the proper remedy is trespass or replevin. 1 Camp. 285; Cowp. 414; 1 Bingham. 342; 8 Moo. 334.||

A tender after the beasts distrained are impounded is void: for, as they are then *in custodia legis*, the person who distrained them has no power to deliver them.

5 Rep. 76, Pilkington's case; ||and see Ibid. note (A), (ed. 1826;)|| Cro. Eliz. 813; 8 Rep. 147; [5 Term R. 433;] ||Anscomb v. Shore, 1 Taunt. 261; 1 Camp. R. 285, S. C.||

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If divers beasts are distrained, and any one of them be impounded before a tender is made, the tender is void.

Lutw. 1262, Alwaies v. Brown.

After the right of making a distress has been tried in an action of replevin, the plaintiff, after judgment for the avowant, may tender the damages; and if his cattle are not thereupon delivered, he may maintain an action of detinue.^(a)

8 Rep. 147; ||Gilb. Dist. 61.|| ^(a)Or, according to Lord Coke, he may, on satisfaction made in court, have a writ for redelivery of the goods; but, it seems, he cannot maintain an action on the case. *Sheriff v. James*, 1 Bingh. 341; 8 Moo. 334.

In an action of debt upon a bond, conditioned for the payment of fourteen pounds at a place certain, upon Michaelmas-day or within one month after, the defendant pleaded, that two days before the end of the month he tendered the money at the place, and that no person was there to receive it. Upon a demurrer this tender was holden to be void. And by the court—It would be hard, that a tender when the plaintiff was absent should be good; and to compel him to attend the whole month would be very unreasonable.

Cro. Eliz. 73, Allen v. Andrews.

If money is to be paid, or goods are to be delivered, at a place certain, upon or before a day certain, a tender cannot be made before the last day limited for the payment or delivery.

Plowd. 172, 173; Bro. Tend. pl. 41; 5 Rep. 114.

In an action of *assumpsit*, the plaintiff declared that, in consideration of 70*l.* by him paid to the defendant, the defendant promised to deliver certain goods at a place certain, upon or before the 18th day of January, and the plaintiff alleged, that the goods were not delivered at the place upon the 18th day of January. After a verdict for the plaintiff, it was objected, that the breach of the promise is not well alleged in this declaration; it being only alleged, that the goods were not delivered upon the 18th day of January, whereas the promise might have been well performed, by delivering them upon any day before that day; but the declaration was holden to be good. And by the court—The defendant, as the 18th day of January was the last day limited for the delivery of the goods, could not have made a tender upon any day before, which would have been sufficient to have excused his delivering them upon that day.

12 Mod. 421, Hammond v. Ouden.

Where money is to be paid, or goods are to be delivered, at a place certain, upon or before a day certain, the tender must not only be made upon the last day limited for the payment or delivery, but it must also be made at the uttermost convenient time of that day; for as one party has until the uttermost convenient time of that day to pay the money, or deliver the goods, it would be unreasonable that the other should be obliged to attend for the receiving of the money or goods before that time.

1 Inst. 211; Plowd. 172, 173; Bro. Tend. pl. 41; 5 Rep. 114.

But, although the party who ought to pay money, or deliver goods, has until the uttermost convenient time of the last day limited for the payment or delivery to pay the money or deliver the goods, a tender is not good, unless there be, after it is made, time enough, before the sun sets, to examine and tell the money, or to examine and take account of the goods:

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for if a man should be compelled to receive either money or goods in the dark, there would be great danger of his being imposed upon.

Plowd. 173; 1 Inst. 202; 5 Rep. 114; 3 Lev. 104; [Tinkler v. Prentice, 4 Taunt. 554, *acc.*; and see Aleyn, 252.]

Notwithstanding the law gives the uttermost convenient time of the last day, limited for the payment of money or delivery of goods, to pay the money or deliver the goods; yet as this is solely for the conveniency of both parties, that neither may be obliged to give longer attendance than is necessary, if it happen that both parties meet at the place at any other time of the last day, or upon any other day within the time limited for the payment or delivery, and a tender be made, the tender is good.

5 Rep. 114; 1 Inst. 202, 211; Cro. Eliz. 14.

And it has been doubted, whether, if the party, who ought to pay money or deliver goods upon or before a day certain, give notice to the party to whom the payment or delivery ought to be made, that he will pay the money, or deliver the goods, upon some day before the last day limited for the payment or delivery, and afterwards make a tender at the uttermost convenient time of that day, the tender would not be good.

12 Mod. 422; Freem. 433.

If the money which is to be paid, or the goods which are to be delivered, at a day certain, cannot, by reason of a circumstance that is not in the power of either party, be paid or delivered at the uttermost time of that day before the sun sets, a tender at the uttermost convenient time that such payment or delivery can on that day be made is good.

It seems to have been formerly holden, that if the contract be for transferring stock at a day certain, a tender may be made at the uttermost convenient time of that day, before the usual time of shutting the books.

Salk. 624, *Lancashire v. Killingworth*; 12 Mod. 533.

But the contrary has been since holden.

A transfer of stock was made at the uttermost convenient time before one of the clock, which was the usual hour for shutting the books: but the party, who had contracted for the stock, not being there to accept any pay for it, the transfer was vacated before the books were shut. As there was more business that day than could be transacted in the morning, the books were opened again in the afternoon; and divers transfers were made. Upon the trial of an action, brought for the money which was to have been paid on transferring the stock, the jury found for the plaintiff: but a new trial was granted. Upon the second trial, which was at bar, it was holden by the Court of King's Bench, that the transfer was not a good tender: for that the general rule, which is that a tender must be at the uttermost convenient time of the day, ought not to be broke through, except in a case of necessity; and that in the present case there was no necessity to break through it; because, as the books were opened again in the afternoon, and the defendant might have been then ready to accept and pay for the stock, the tender ought to have been made at the uttermost convenient time before the shutting of the books in the afternoon.

Stra. 777, *Duke of Rutland v. Hodson*; Ld. Raym. 686, S. C.

If money is to be paid, or goods are to be delivered, at a place certain, notice, although no time be fixed for the payment or delivery, may be given to the party to whom the payment or delivery is to be made, that the

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money will be paid, or the goods delivered, upon a day therein mentioned; and a tender at the uttermost convenient time of that day is good.

1 Inst. 211; Dyer, 354.

If a man be bound to pay 20*l.*, some time during his life, at a place certain, the obligor cannot tender the money whenever he pleases; for then the obligee would be under a necessity of perpetual attendance: but, if he give notice to the obligee, that upon a day certain he will pay the money, a tender at the place at the uttermost convenient time of that day is good.

8 Rep. 92, Frances's case.

Although no time be fixed for the payment of money, or delivery of goods, at a place certain, if the party, who ought to pay the money or deliver the goods, accidentally meet the party to whom the payment or delivery ought to be made, at any time at the place, he may then make a tender.

1 Inst. 202, 211; 5 Rep. 114; Cro. Eliz. 14.

||A bill of exchange being a contract to pay money at a particular day, a plea of tender of the money due upon it after the day of payment, but before action brought, is not good; for the averment of *touts temps prist* is material in every plea of tender; and the defendant (the acceptor), not having paid the bill at the day of payment, could not aver that he was always ready.

Hume v. Peploe, 8 East, 168; *sed vide* 5 Barn. & A. 630.

But the drawer or endorser may plead a tender made within a reasonable time after notice of the dishonour.

Walker v. Barnes, 5 Taunt. 240.||

§ When a man is bound to do a thing, he must either do it, or offer to do it; if no objections are made, he must show that he has made a tender in a regular manner; but this is not requisite, if the other party, by his conduct, has dispensed with a regular tender by a previous refusal to accept.

Blight v. Ashley, 1 Pet. C. C. R. 24.

A tender is requisite, although the creditor should require payment exclusively in a particular species of coin.

Searight v. Calbraith, 4 Dall. 325.

When the plaintiff has a title to recover at law, and the defendant has an equitable claim which ought to be first satisfied, a tender made at the time of trial is sufficient.

Snyder v. Wolfley, 8 S. & R. 332.

A tender must be before suit brought; it is in time, although the creditor may have directed a suit to be brought.

Hubbard v. Chenango Bank, 8 Cowen, 88. See Ripley v. Wardell, 1 Caines, 175; Jackson v. Law, 5 Cowen, 248.

When a promissory note, not negotiable, was made payable in sixty days from date, and it fell due on Sunday; held that a tender on the following Monday was good.

Avery v. Stewart, 2 Conn. 69.

When, by the contract, payment is to be made in specified articles on a day certain, though the creditor is entitled to a delivery in such season as to be able to examine and take an account of the articles before sunset,

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yet, if the debtor is present at the place of delivery, prepared, in all respects, to deliver the articles in sufficient season, and the creditor neglects to attend to receive them, a tender after sunset, by day-light, will be good.

2 Conn. 69.

After a contract has been broken, a tender is not effectual to bar an action for damages.

Suffolk Bank v. Worcester Bank, 5 Pick. 106; City Bank v. Cutter, 3 Pick. 414. See Maynard v. Hunt, 5 Pick. 240; Lawrence v. Gifford, 17 Pick. 366.

To make a tender valid, the debt must be due at the time of the tender.

Tillou v. Britton, 4 Halst. 120.

Before bringing the action, the plaintiff's attorney wrote to the defendant to say, that unless the debt, together with his (the attorney's) charge for that letter, were paid at his office on the Wednesday following, at 12 o'clock, proceedings would be commenced. On Wednesday at 10 o'clock, an agent of the defendant went to the attorney's office, and there saw a boy, to whom he tendered the amount of the debt only. The boy, after referring to the letter-book, refused to accept it, unless the charge were also paid; it appeared that the writ was issued at 11 o'clock on that day: held, (Parker, B., *dubitante*,) that this was a good tender.

Kerton v. Braithwaite, 1 Mees. & Wels. 310.

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A TENDER may be made to any person, in whom, either as a party or privy, the right to the thing tendered is.

A tender to an executor is good; because the right of his testator to the thing tendered is devolved upon him as a privy in representation.

Cro. Ja. 245, Ratcliffe v. Davies; 4 Rep. 123.

A tender to an executor, even before he has proved the will of his testator, is good, provided that he afterwards prove it; because he thereby becomes an executor *ab initio*.

Eq. Cas. Abr. 319, Austin v. The Executors of Dodwell.

{ A tender to one of several obligees is a tender to all.

2 Wash. 297, Warder v. Arell. }

If a bond be entered into, with condition to pay money to J S or his assign, and the bond is assigned, a tender may be made to the assignee; because he is a privy to the condition.

Moor, 37; Bro. *Tend.* pl. 1.

Hale, C. J., seems to have been of opinion, that if the conusee of a statute-merchant, after extending the land, assign it over, a tender to the assignee is not good; for that the tender ought to be made to the conusee.

1 Vent. 211.

But in another book it is laid down, that a tender may in such case be made to the assignee; and a doubt is made, whether a tender to the conusee after the assignment would be good.

Bro. *Tend.* pl. 38.

A tender to a stranger is not good.

If the condition of a bond be to pay money to a stranger, a tender to the stranger will not save the penalty.

Cro. Eliz. 755, Huish v. Phillips; 12 Mod. 441; Moor, 37.

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But, if a bond be entered into by A, with condition for the payment of money to B to the use of C, a tender to C is good; because as the obligation is for his benefit, C is not to be considered as a stranger, but as a trustee for B.

Cro. Eliz. 755, *Huish v. Phillips*.

It is laid down, that a tender of amends to a bailiff, who has distrained beasts damage-feasant, is not good; because, as he is only a servant, he has no power to deliver the beasts.

5 Rep. 76, *Pilkington's case*, Pasch. 45 Eliz. ¶Vide note, Ibid. (ed. 1826.)¶

And the authority of this case has been recognised as law in two subsequent cases.

1 Brownl. 173, *Roberts v. Young*, Hil. 9 Jac. 1; Cro. Ja. 377, *Winfield v. Bell*, Mich. 13 Jac. 1; ¶6 Espin. N. P. C. 95.¶

Holt, C. J., did, indeed, in a case subsequent to these three cases, declare himself dissatisfied with the determination as to this point in *Pilkington's case*.

12 Mod. 354, *Horn v. Luines*.

But it does not appear that there has been any determination contrary thereto.

¶However it is settled that a tender of money to a servant or agent authorized to receive payment is a good tender to the principal.

Goodland v. Blewith, 1 Camp. 477.

And where a creditor told his clerk, who was previously authorized to receive the money, not to receive a sum if offered by a particular debtor, as he had put it into the hands of his attorney, and the clerk, on tender made, refused to receive the money and give the receipt: held that this was a good tender to the principal.

Moffat v. Parsons, 1 Marsh. 55; 5 Taunt. 307; and see *Wilmott v. Smith*, Moo. & Malk. Ca. 238.¶

[In *assumpsit* for work and labour there was a plea of tender, upon which issue was joined. The evidence for the defendant on the tender was, that being indebted to the plaintiff in the sum claimed by the action, he had sent the money by his maid-servant to the plaintiff's house. She swore that she carried it to the plaintiff's house, and that seeing a servant there, who informed her that her master was at home, she delivered the money to that servant to be delivered to her master; that the servant took it, and went into the house, as she supposed to deliver it to the plaintiff, and returned with an answer that he would not receive it, but that she must go to his attorney. It was objected, that this was not a legal tender, there being no evidence of its being made to the party himself. But Lord Kenyon said, that in the common transactions of life, this kind of intercourse by the intervention of servants must be allowed; and that if money was so brought to the house of the plaintiff, and delivered to his servant, who retired, and appeared to go to the master, it was evidence to be left to the jury, from which they might infer that a tender was made. The defendant had a verdict.

Anon., Espin. Ni. Pr. Ca. 349.] ¶Vide 1 Camp. R. 477.¶

βWhen no place for the payment or performance is appointed, a tender to the person is good.

Slingerland v. Morse, 8 Johns. 476. See *Hunter v. Le Conte*, 6 Cowen, 728.β

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(F) The Consequences of a Tender and Refusal.

A TENDER by one party, of paying a debt, or performing a duty, and a refusal by the other to accept thereof, do in some cases amount to a payment of the debt, or a performance of the duty.

{Vide 1 Dall. 406, *Johnson v. Hocker*; 2 Wash. 283, *Warder v. Arell*.}

But it will appear, that the discharge is in such cases an accidental and not a necessary consequence of the tender and refusal; the debt or duty being discharged, because the cases were so peculiarly circumstanced that there was not, after the tender and refusal, any remedy to enforce the payment of the debts, or the performance of the duties.

When the plaintiff has a direct cause of action, the only effect of a tender and refusal is to expose the plaintiff to the loss of costs, if the defendant pleads the tender and brings the money into court.

Cornell v. Green, 10 S. & R. 14.

The effect of a tender, when lawfully made, is to discharge the debtor from subsequent interest and costs.

Law v. Jackson, 9 Cowen, 641; S. C., 5 Cowen, 248; *Raymond v. Bearnard*, 12 Johns. 274.

A tender and refusal is equivalent, for some purposes, to an actual acceptance.

Coit v. Houston, 3 Johns. Cas. 243; *Hepburn v. Auld*, 1 Cranch, 321.

A tender of money due upon a judgment does not, *per se*, discharge or take away the lien of a judgment creditor.

Law v. Jackson, 9 Cowen, 641; S. C., 5 Cowen, 248.

The tender of specific articles on the day appointed at the place specified for the performance, is a satisfaction of the contract, when a note is payable in specific articles; and, if the tender be not accepted, the right of action is not revived by a subsequent demand and refusal. In such case the relation of the parties is changed to that of bailor and bailee.

Lamb v. Lathrop, 13 Wend. 95. See *Gould v. Banks*, 8 Wend. 562. In Connecticut the benefit of such tender is lost, by a subsequent demand and refusal. *Rose v. Brown*, Kirby, 295.

If after having made a tender, the debtor refuses to pay the debt upon any future demand, he loses the benefit of his tender.

Town v. Trow, 24 Pick. 168.

But if the demand be made at an unreasonable hour, it will not avoid the effect of the tender.

Tucker v. Buffum, 16 Pick. 46.

If A, without any debt or duty preceding, enfeoff B of land, with condition for the payment of a hundred pounds to B in the nature of a gratuity, and A tender the money to B, and B refuse to accept it, the land is thereof discharged for ever; because, as the hundred pounds is collateral to the land, B has no remedy for the recovery thereof.

1 Inst. 207.

If a single bond be entered into for the payment of twenty pounds to the obligee, and afterwards a deed be made, that upon the payment of ten pounds the bond shall be void, and the obligor tender the ten pounds, and the obligee refuse to accept it, the obligor is discharged for ever; for the obligee, the ten pounds being collateral to and not parcel of the sum men-

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tioned therein, cannot recover it in an action upon the bond, and he has no remedy to recover the sum mentioned in the defeasance.

1 Inst. 207; 9 Rep. 79; Bro. *Tout temps prist*, pl. 31; 2 Roll. Abr. 523; Cro. Eliz. 755; {Willes, 107, Trevett v. Aggas; S. P. Com. 568, S. C.}

If a man enter into an obligation, in the penalty of a hundred pounds, with condition to perform an award, or to do some other thing for the benefit of the obligee, which it was not incumbent upon the obligor to do at the time of entering into the obligation, a tender by the obligor of performing the award, or of doing the other thing, and a refusal by the obligee to accept thereof, are a perpetual bar to an action upon the obligation: for, as the condition is satisfied by the tender and refusal, the penalty cannot be recovered; and as the performing of the award, or doing the other thing, which it was not incumbent upon the obligor to do at the time of entering into it, could not be parcel of the obligation, no action lies thereupon to compel the performance of the award, or the doing of the other thing.

1 Inst. 207, 209; Bro. *Tout temps prist*, pl. 1, pl. 2, pl. 21, pl. 31; 9 Rep. 79; 2 Roll. Abr. 523; Cro. Eliz. 755; 1 Show. 129.

And it would make no difference, if, in the case of an obligation for performing an award to be made after the obligation was entered into, the payment of money is awarded: for, if a tender of the sum awarded be made by the obligor and refused by the obligee, no action lies upon the obligation; the money being in this case no more parcel thereof than any other thing which might have been awarded would have been.

3 Lev. 24, Genne v. Tinker; Salk. 75.

But, where an obligation is entered into for performing a duty for the benefit of a stranger, the obligor, although the duty be collateral to and not parcel of the obligation, is not discharged by a tender of performing the duty, and the refusal of the stranger.

If A be bound in an obligation to B, with condition to enfeoff C, and a tender be made by A of enfeoffing C, and C refuse to be enfeoffed, the obligation is forfeited: for as the obligor hath at his peril taken upon himself to enfeoff C, his refusal who is a stranger does not satisfy the condition, and consequently an action will lie upon the bond.

1 Inst. 209; 5 Rep. 23.

But, if A enter into a bond to B, with condition to enfeoff C to the use of B, and a tender be made of enfeoffing C, who refuses to be enfeoffed, the obligation is saved: for, as the act was in this case to be done for the benefit of B, C is not to be considered as a stranger, but as a trustee for B.

1 Inst. 209; Cro. Eliz. 755; Cro. Ja. 14.

If the condition of an obligation be, that the obligor shall pay a sum of money to the obligee, in pursuance of an award made before the obligation was entered into, a tender and refusal of the money awarded is no discharge thereof: for, although the condition of the bond be thereby so far satisfied that the penalty cannot be recovered, the money awarded, which is in this case parcel of the obligation, continues to be due, and may be recovered in an action upon the obligation.

2 Roll. Abr. 524. {A tender on a bond with a penalty does not bar an action on the bond. 2 Johns. Rep. 24, Manny v. Harris.}

In any case, however, where the debt or duty would not otherwise have been discharged by a tender and refusal, if the party, to whom the tender has been made, take issue upon the tender, and it be found against him,

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the debt or duty is discharged; for it was at his peril to take an issue, by the finding of which his refusal is become matter of record.

1 Inst. 207; Bro. *Tout temps prist*, pl. 32; Salk. 597; Styl. 388.

Notwithstanding the party, who has made a tender of paying a debt, or performing a duty, be not thereby discharged of the debt or duty, although the other party refuse to accept thereof, he is by the tender and refusal discharged of the damages, to which he would otherwise have been liable, by reason of the non-payment of the debt, or the non-performance of the duty.

If A borrow a hundred pounds of B, and afterwards mortgage land to B, with condition for the payment thereof. In this case, if A tender the money, and B refuse to accept thereof, the land is discharged, and B shall not be liable to damages for non-payment of the debt; but the debt, which existed before the mortgage, remains, and may be recovered in an action.

1 Inst. 209.

If a corporal service be due from a tenant to his lord, a tender of the service by the tenant, and a refusal by the lord to accept thereof, are a discharge of damages for not having done it: but, as the lord has the same remedy to compel the doing of the service as he had before the tender and refusal, it is not thereby discharged.

Bro. *Tout temps prist*, pl. 24.

If an obligation be entered into in the sum of 20*l.*, with condition for the payment of 10*l.*, and the obligor tender the 10*l.*, and the obligee refuse to accept it, the obligor is discharged of damages for non-payment thereof: but an action will still lie upon the obligation for the 10*l.*, it being parcel of the sum mentioned in the obligation.

1 Inst. 207; Bro. *Tout temps prist*, pl. 31; 2 Roll. Abr. 523, 524; Salk. 623; Ld. Raym. 254.

If the money due upon a mortgage carrying interest be tendered to the mortgagee, and he refuse to accept thereof, the mortgagor is discharged of interest from the time of making the tender.

2 Freem. 174, *Manning v. Burgess*, 2 Chan. Ca. 206.

But in order to entitle a mortgagor, in such case, to a discharge of interest, it must appear that he has, ever since the tender and refusal, kept the money ready for paying off the mortgage, and that no profit has been made of it.

2 P. Wms. 378, *Gyles v. Hall*; 2 Chan. Ca. 206.

A right to damages, on the account of the non-payment of a debt, or the non-performance of a duty, may, after being taken away by a tender and refusal, be restored by a demand subsequent to the tender and refusal; for, if the debt or duty be not discharged by the tender and refusal, a new right to damages accrues from the non-payment or the non-performance upon the subsequent demand.

{2 Johns. Rep. 31, *Manny v. Harris*. And see 1 Esp. Rep. 115, *Coore v. Callaway*; 4 Esp. Rep. 94, *Hayward v. Hague*.}

If A have tendered a sum of money to B, and B have refused to accept thereof: yet if a demand be afterwards made by B and the money be not paid, A is liable to damages for non-payment from the time of the demand.

1 Brownl. 71.

A distress may, after a tender and refusal, be made for rent in arrear; and

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(G) The Consequences of being ready to tender, &c.

in this case a demand subsequent to the tender and refusal is not necessary, the distress itself being a demand in law.

Hob. 207, *Cranley v. Kingswill*.

If a demand of a sum of money carrying interest be made after a tender and refusal to accept the same, and the money be not thereupon paid, interest begins again to grow due from the time of the demand.

It was formerly holden, that if a man, in consequence of an act to be done by him, would acquire a right to a debt or duty, he does not acquire the right, unless the thing first to be done by him have been actually done.

A by indenture covenanted to pay a sum of money to B, and B covenanted by the same indenture to execute, upon the receipt thereof, a release of his claim to certain land. The money being tendered by A, B refused to accept it; and did not execute the release. An action of covenant was hereupon brought: but the court were of opinion, that as B was only bound to execute the release upon receiving the money, and it had not in fact been received by him, there was not a sufficient breach of covenant to ground an action upon.

Styl. 481, *London v. Craven*.

But the law is now settled, that where a man would upon doing a previous act have acquired a right to a debt or duty, this is as completely acquired, if he make a tender of doing the previous act, and the other party refuse to suffer it to be done, as if it had been actually done.

Cro. Ja. 245; 2 Saund. 352; Salk. 75, 523; 12 Mod. 530; Ld. Raym. 964; Stra. 777; [Dougl. 694; 1 Term R. 638, 645;] ||1 East, 619; 8 East, 437.||

An agreement was made, that A should pay a sum of money to B, and that B should, upon the payment thereof, surrender a certain lease to A. The money was tendered by A; B refused to accept thereof, and did not surrender the lease. An action being hereupon brought, it was holden, that A could as well maintain the action against B for not surrendering the lease as if the money had been actually paid.

Cro. Eliz. 889, *Lea v. Exelby*. ||Vide 2 H. Black. 123.||

In an action of covenant the plaintiff declared, that the defendant had covenanted to accept a transfer of one thousand pounds Hudson's Bay stock, and upon the transfer thereof to pay the plaintiff two thousand pounds; and the plaintiff averred, that he offered to transfer the stock, and that the defendant did not come to accept or pay for the same. It was holden, upon a demurrer to the declaration, that the plaintiff was as well entitled to the money as if he made an actual transfer of the stock.

Ld. Raym. 686, *Lancashire v. Killingworth*.

(G) The Consequences of being ready to tender, when the Party to whom it was intended to have been made was not present.

THE consequences of a tender and refusal have been treated of at large under the foregoing head.

It is by no means necessary to recite any of the cases thereunder cited.

Nothing more is required, under the present head, than to observe, that every consequence which would have followed from a tender and refusal, will follow, from being ready to tender, in case the person whose duty it was to be present at the place where the tender was intended to have been made, neglected to be present.

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If every such consequence did not follow, it would frequently happen, that, notwithstanding one party has done all that was in his power to make a tender, all would be rendered ineffectual by the wilful absence of the other party.

§ When the purchaser of goods refuses to take them, a tender on the part of the vendor is not requisite.

Calhoun v. Vechio, 3 Wash. C. C. R. 165. See Blight's Executrix v. Ashley, Pet. C. C. R. 15.7

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1. In the General.

EVERY requisite, which is necessary to the validity of a tender, must, in pleading the tender, be shown to have been complied with; else the plea, for want of showing that the party tendering has done all that was in his power to pay the debt or perform the duty, is not good.

Salk. 624, Lancashire v. Killingworth.

A plea of tender at the day was holden to be bad; because it was not alleged, that the tender was made at the uttermost convenient time of the day.

Cro. Ja. 423; Furfer v. Proud, Salk. 624.

In an action of covenant for money due upon a contract for transferring stock, the plaintiff alleged, that he was ready at the day and place, and offered to transfer the stock. The declaration was holden to be insufficient, for want of showing the tender to have been made at the uttermost convenient time of the day that the stock could have been accepted.

12 Mod. 531; Lancashire v. Killingworth, Salk. 624; Ld. Raym. 688; Sat. 777, 833.

In an action of debt for rent the defendant pleaded, that at the day on which the rent became due he was ready to pay it. The plea was holden to be bad; because it was not alleged, that he offered to pay the rent; for it is the tender, and not the being ready, which is traversable.

3 Lev. 104; Cole v. Walton, 2 Lev. 209; 12 Mod. 353; Noy, 74.

If the party to whom a tender was intended to have been made was present at the time of tendering, or if it do not appear from the pleadings that he was absent, it must be averred that there was a refusal; for the refusal, as well as the tender, is traversable.

Sid. 13; 2 Lev. 23; 2 Ventr. 109; Salk. 623; 12 Mod. 530; Ld. Raym. 687, 964.

An agreement was, that the plaintiff should build a house for the defendant; and that the defendant should pay the plaintiff a sum of money for his labour in building it. In an action for the money, the plaintiff averred, that he had made a tender of building the house; but he did not aver, that the defendant had refused to suffer him to build it. It was holden, that the declaration was insufficient, for want of showing a refusal by the defendant.

2 Saund. 352, Peeters v. Opie.

A promised to pay a sum of money to B at a day and place certain; and B promised to surrender upon the payment thereof a certain lease to A. In an action of *assumpsit* brought by A, he alleged, that he had tendered the money at the day and place; and that B had not surrendered the lease. All the court held, that the allegation of the tender was ill; it

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not being enough for A to say, that he tendered the money, but he ought to have said further, that the defendant did not come to the place, or that he refused to receive the money.

Cro. Eliz. 889, *Lea v. Exelby*. ||Vide 2 H. Black. 123.||

But, if the party to whom a tender was intended to have been made at a place certain, did not come to the place, it is sufficient for the party, who intended to make a tender, to allege, that he was at the place with design to make a tender, and that the other party did not come to the place.

Ld. Raym. 687, *Lancashire v. Killingworth*; Cro. Eliz. 755; Salk. 623; 12 Mod. 530.

It was heretofore a question, whether it ought not in such case to be averred, that neither the party nor any one for him did come to the place; and in some precedents the averment is in this manner.

12 Mod. 531; Cro. Eliz. 73; Cro. Ja. 423.

But it seems to be now settled, that it is in such case sufficient to aver that the party did not come to the place; for if any one lawfully authorized to receive the thing intended to have been tendered had come, it would have been the same thing as if the party had himself come.

Cro. Eliz. 755, *Huish v. Phillips*; Cro. Ja. 14; 12 Mod. 531.

[If A, B, and C have a joint demand, and C has a separate demand on D, and D offers A to pay him both the debts, which A refuses, without objecting to the form of the tender on account of his being entitled only to the joint demand, D may plead this tender in bar of an action on the joint demand, but should state it as a tender to A, B, and C.

Douglas v. Patrick, 3 Term R. 683.]

If the debt or duty be discharged by a tender and refusal, the plea of tender ought to conclude with praying judgment of the action; for by the tender and refusal the action is in such case barred for ever.

1 Inst. 207; 9 Rep. 79; Bro. *Tout temps prist*, pl. 1, pl. 2, pl. 21, pl. 31; 2 Roll. Abr. 523; Cro. Eliz. 755; Carth. 143.

But, if only damages are discharged by a tender and refusal, the plea of tender ought to conclude with praying judgment of the damages: because the tender and refusal are in such case only a bar of damages.

Ld. Raym. 254; 1 Inst. 207; Bro. *Tout temps prist*, pl. 24, pl. 31; 2 Roll. Abr. 523; Salk. 623; Carth. 143.

As the damages barred by a tender and refusal are only those which are occasioned by the non-payment of the debt, or the non-performance of the duty, the plea of tender in an action of *assumpsit* must never conclude with praying judgment of the damages: for as this action is only to recover damages, a plea in bar of the damages would in effect be a plea in bar of the action. The proper way of pleading a tender in an action of *assumpsit* is, either to confess damages to a certain amount, and pray that the plaintiff may proceed at his peril for the residue; or to bring a sum of money into court, and pray judgment *de ulterioribus damnis*.

Ld. Raym. 254; *Giles v. Hartis*, Salk. 623.

It has been holden, that a plea of tender is an issuable plea.

Pay v. Dearsley, Barnes, 361.

But, if a judge's order has, upon the condition of pleading an issuable plea, been obtained for time to plead, a tender cannot be pleaded; this not being an issuable plea within the meaning of such order.

Rep. of Pr. in C. B. 134; Barnes, 252, *Lane v. Smith*; *Davenhill v. Barritt*, Barnes,

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337. [But the contrary has been since adjudged in the Court of King's Bench. *Kilwick v. Maidman*, 1 Burr. 59.] ||And is now settled, 1 Saund. 33 b, n. 2; 2 Ibid. 2. a; 1 H. Black. 369.||

It has been refused to suffer the general issue and a plea of tender to be pleaded to the same count; (a) because these two pleas are contradictory.

Barnes, 359, *Alderson v. Dodding*. [(a) Or to the whole declaration. *Maclellan v. Howard*, 4 Term R. 194. But in both these cases the actions were upon promises. In *trespass*, the defendant may plead the general issue and tender of amends, *Gerring v. Manning*, Barnes, 366; *Martin v. Kesterton*, 2 Bl. Rep. 1093.]

But, if there be two counts, this court will give leave to plead a tender to one count, and the general issue to the other.

Barnes, 362, *Pitfield v. Morcy*.

A motion being made, that the defendant might withdraw his plea of tender and plead the general issue, it was denied; and by the court—The suffering of this, as the money pleaded to have been tendered is brought into court, may be an inconvenience to the plaintiff.

Barnes, 330, *Reeves v. Probart*.

Where the condition of a bond is to deliver certain goods "in all the month of May," to avail himself of a readiness to perform, the defendant must plead that he was ready and prepared at the last convenient hour of the last day of the month.

Savery v. Goe, 3 Wash. C. C. R. 140.

The debt or duty continuing, a tender should be pleaded with a *profert in curia*; and it should conclude praying judgment whether the plaintiff ought to recover any damages by reason of the non-payment of the sum alleged to have been tendered.

Karthaus v. Owings, 6 Harr. & Johns. 134.

A plea of tender is not supported by proof of a tender of a promissory note due from the plaintiff to the defendant.

Carey v. Bancroft, 14 Pick. 315.

A plea of tender ought to state particularly the day when it was made, and the sum offered; and further that the defendant was "always ready," not from the time of tender, but from the time when payment should have been made.

Downman v. Downman's executors, 1 Wash. 26.

A plea of tender should be accompanied with the money brought into court, at the time of filing the plea, without which it may be treated as a nullity or stricken out by the court; but a replication to such plea is a waiver of all irregularity.

Earle v. Earle, 1 Harr. 237.

A tender before action brought is not pleadable to an action for unliquidated damages.

Searle v. Barrett, 4 Nev. & M. 200.g

2. Where Uncore prist is pleaded.

Wherever a debt or duty is discharged by a tender and refusal, it is not necessary, in pleading the tender, to plead *uncore prist*: nay, it would be strange for a party to say he is still ready to pay a debt, or to perform a duty, of which he is discharged.

Bro. *Tout temps prist*, pl. 1, pl. 2, pl. 21, pl. 31; 2 Roll. Abr. 523; 1 Inst. 207; Cro. Eliz. 755; 1 Show. 129.

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But, where a debt or duty is not discharged by a tender and refusal, it is not enough, for the party who pleads the tender, to plead a tender and refusal, but he must also plead *uncore prist*.

Bro. *Tout temps prist*, pl. 1, pl. 2, pl. 21, pl. 31; 1 Inst. 207; 2 Roll. Abr. 523; Cro. Eliz. 755; 1 Show. 129. ¶ When the condition of a bond is not parcel of the obligation, as where the bond is for the payment of money, and the condition is for the delivery of certain goods, the defendant is not required to plead *uncore prist*, 3 Wash. C. C. R. 140.

If any service, which ought to have been done to a lord at a day certain, has been tendered at the day, the party who pleads this tender must not only allege, that he tendered the service at the day; but as the service continues to be due, he must also plead, that he is still ready to do it.

Bro. *Tout temps prist*, pl. 24.

In an action of debt upon a bond, conditioned for the payment of a less sum at a day certain, a plea of tender at the day is not good; for as the less sum still remains due, the defendant must further say, that he is still ready to pay it.

1 Inst. 207; Bro. *Tout temps prist*, pl. 31, 2 Roll. Abr. 523, 534; Salk. 623; Ld. Raym. 254.

In an action of debt upon a bond, the condition was to pay money at a day certain, but no place was appointed for the payment. The defendant pleaded, that the plaintiff was not in England at the day. This plea was upon a demurrer holden to be bad, for want of pleading *uncore prist*.

Sid. 30, *Hobson v. Rudge*.

In an action of debt upon bond, with condition to pay money to the administrators of the obligee within two months after his decease, the defendant pleaded that he was ready to have paid it, but that no letters of administration were granted within two months after the decease of the obligee, and consequently that there was no administrator to receive it. Upon a demurrer, this plea was holden to be bad; because, as the debt was not discharged, the defendant ought to have pleaded, that he is still ready to pay it.

2 Show. 143, *Lea v. Garrett*.

But, if a tender at the day, of corn, or of any other goods of a perishable nature, be pleaded, with a refusal, there is no need to plead *uncore prist*; for as such goods may have perished, and if they have not, as it might have been an expense to keep them, it would be hard to compel a party to be ready at all times after the tender and refusal to deliver them.

9 Rep. 79, *Peyton's case*; 1 Inst. 207.

The doctrine of this case seems to apply to all kinds of goods which are bulky; for there must always be an expense, in finding a warehouse for such goods.

Uncore prist may be pleaded after either a general or special imparlance.

Dyer, 300; Sid. 364; 12 Mod. 8, 354; Ld. Raym. 254.

3. *Where Uncore prist together with Tout temps prist is pleaded.*

Wherever the debt or duty arises at the time of the contract, and is not discharged by a tender and refusal, it is not enough for the party who pleads a tender, to plead the tender and refusal with *uncore prist*; but he must likewise plead *tout temps prist*.

Salk. 622, 623; 12 Mod. 153; Ld. Raym. 254; Comb. 444; Carth. 413.

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In an action of *assumpsit* for the money due for goods sold and delivered, the defendant pleaded a tender before the action was brought, and that he is still ready to pay the money. It was objected, that as the money became due upon the delivery of the goods, the defendant ought to have pleaded, that he has been at all times, from the time of the delivery, and is still ready to pay the same. This was holden to be a material objection.

10 Mod. 81, Whitlock v. Squire; {Willes, 632, Haldenby v. Tuke; 1 Wash. 29, Downman v. Downman's Ex'rs., S. P.}

{A plea of tender after the day of payment of a bill of exchange, and before action brought, is not good, though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the whole money due on the bill with interest from the time of default for the damages sustained by non-performance of the contract. In strictness a plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract.

8 East, 168, Hume v. Peploe.}

If the defendant have pleaded *tout temps prist*, the plaintiff may reply a demand between the time of the contract and the tender, and show the time of making it; for he was not bound to allege such special demand in the declaration.

Ld. Raym. 254; Giles v. Hartis, Salk. 623; 12 Mod. 153; ||8 East, R. 168.]

||The averment of *tout temps prist* is essential in a plea of tender. Therefore, where defendant has been guilty of neglect in non-payment of money, payable at a particular day, (e. g. a bill of exchange,) it is no plea to say, that after that day he tendered the money, and *from the time of tender* has been ready and willing to pay it, unless he shows that he was always ready and willing from the time when it became due.

Hume v. Peploe, 8 East R. 168.

But the plaintiff must prove a demand of the exact sum due, and a refusal. And the demand must be made by some person authorized to receive payment and give a discharge. After a tender by two on a joint contract, a subsequent application to one of them is sufficient to support a replication alleging a demand of both defendants.

Spibey v. Hide, 1 Camp. 181; 1 Camp. 478, n.; 1 Esp. Ca. 115; 1 Stark. 325; and see 4 Esp. Ca. 93; 6 Ibid. 95.]

A defendant, after a *nihil* had been returned to the original, came at the *capias*, and pleaded *tout temps prist*. It was holden, that as it appeared from the return of *nihil*, that he had not conusance of the original, the plea was good; but, that if he had had conusance of the original, he would, because he did not plead *instante*, have been estopped to plead *tout temps prist*.

Bro. *Tout temps prist*, pl. 30.

Tout temps prist may be pleaded after an *essoins* cast; for, although this plea be a kind of *imparlance*, as the *essoins* may have been cast by a stranger, it is not clear that the defendant had conusance of the writ.

1 Inst. 131; Bro. *Tout temps prist*, pl. 20, pl. 36; 2 Roll. Abr. 523.

It is laid down in divers books that *tout temps prist* cannot be pleaded after a general *imparlance* by the defendant.

Bro. *Tout temps prist*, pl. 27; Salk. 622; 12 Mod. 8, 72, 84, 354; Freem. 205.

The reason assigned in two books why the defendant cannot plead *tout temps prist* after a general *imparlance* by him, seems to be very conclu-

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sive ; namely, that after he has desired to imparl before he answers to the declaration, it is a contradiction to say, that he has been always ready to satisfy the demand of the plaintiff.

2 Mod. 62; Anon. Freem. 105.

But, where a general imparlance is given by the plaintiff, the court will, within the first four days of the next term, that he may have an opportunity of pleading *tout temps prist*, make a rule for the defendant to plead a tender as of the preceding term.

Barnes, 343, King v. Nichols.

And if, after a general imparlance given by the plaintiff, the declaration be delivered so short a time before the essoin-day of the next term, that the defendant's agent has not time to write into the country, and receive instructions so as to move the court within the first four days of the next term, the court will, if the application be as soon after the first four days as it can conveniently made, give leave to plead a tender as of the preceding term.

Barnes, 357, Brown v. Hagan.

It is not perhaps quite settled, but it seems to be the better opinion, that *tout temps prist* may be pleaded after a special imparlance.

In an action of *assumpsit* the defendant imparled specially, *salvis omnibus exceptionibus tam brevi quam narrationi*; and the question was, Whether *tout temps prist* could be pleaded after this imparlance? It was holden that it might.

Freem. 134, Bone v. Andrews. ||It is now settled that a tender may be pleaded after imparlance. 1 Saund. 33 b, n. 2; Tidd's Prac. 474, (7th edit.)||

It is in the general true, that *tout temps prist* cannot be pleaded after a demurrer.

But the court will, after a demurrer, upon the particular circumstances of the case, give a defendant leave to plead as of a former term, or compel a plaintiff to declare as of a subsequent term.

A declaration of Hilary term being demurred to for insufficiency, the plaintiff obtained a judge's order to amend, and in Easter term following gave a rule to plead. Hereupon the defendant obtained a rule, in order to have an opportunity of pleading *tout temps prist*, that he might plead as of the Hilary term, or that the plaintiff might make his declaration as of the Easter term.

Barnes, 359, Roberts v. Hughes,

4. Where a Profert in curia is pleaded.

It is in the general true, that if a debt or duty be not discharged by a tender and refusal, the tender must be pleaded with a *profert in curia*; for as the debt or duty continues, it is not enough for the party who pleads the tender to plead a tender and refusal with *uncore prist*, or with *uncore prist* together with *tout temps prist*, as the case may require, but he must also bring the money, or other thing which has been tendered, into court, that the other party may, if he please, accept thereof.

Bro. *Tout temps prist*, pl. 15, pl. 25, pl. 31, pl. 41, pl. 43; 2 Roll. Abr. 524; 12 Mod. 354; Ld. Raym. 83, 254, 643; 1 Barn. 181; Stra. 638.

If a defendant in an action of debt upon a bond, with condition for the payment of a less sum at a day certain, plead a tender with *uncore prist*, the plea is not good without bringing the money into court.

Ld. Raym. 643, Horn v. Lewin.

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(I) The Consequences of a *Profert in curia*.

So, in an action of debt for money due for rent, if a tender be pleaded with *uncore prist*, together with *tout temps prist*, the money must be brought into court.

Bro. *Tout temps prist*, pl. 25; 12 Mod. 354.

It has indeed been holden, that if the contract be to pay money at a place certain, it is not necessary in pleading a tender to bring the money into court; because the party is not bound to pay the money at any other place.

Bro. *Tout temps prist*, pl. 6, pl. 35.

But it seems to be the better opinion, that it is not sufficient for a party to plead in such case, that he is still ready to pay the money at the place, for that he ought to bring it into court.

Bro. *Tout temps prist*, pl. 43; 2 Roll. Abr. 524.

A plea of tender with a *profert in curia* is not good, unless the money, or other thing tendered, be, in fact, brought into court.

A defendant had pleaded a tender of money with a *profert in curia*; but it appeared that the money was not brought into court. It was holden that the plea was not good, and that the plaintiff might sign judgment.

Stra. 638, Pether v. Shelton.

If there are several avowries against several tenants, for the same rent-charge, it is not necessary for every tenant who pleads a tender to bring the money into court.

A distress being made upon several tenants, for one rent-charge, issuing out of the lands holden by them all, every one brought an action of replevin. As the grantee of the rent-charge made the same avowry against them all, each tenant pleaded in bar of the avowry against him a tender with a *profert in curia*. The court made a rule, that the bringing in of money upon one avowry should be good as to all the avowries.

Ld. Raym. 429, Anon.

If the thing which has been tendered be so heavy that it cannot conveniently be brought into court, it is not necessary to plead a tender with a *profert in curia*.

Bro. *Tout temps prist*, pl. 3; 2 Roll. Abr. 524; 1 Barn. 200.

It must, however, in such case, be alleged, that the thing cannot, by reason of its weight, conveniently be brought into court.

Bro. *Tout temps prist*, pl. 3; 2 Roll. Abr. 524.

(I) The Consequences of a *Profert in curia*.

It is in the general true, that if the money, or other thing which has been tendered, be upon pleading the tender brought into court, the plaintiff is entitled thereto, although he should afterwards be nonsuited, (a) or there should be a verdict against him.

||(a) It was considered by Heath, J., that after a plea of tender the plaintiff could not be nonsuited. *Harding v. Spicer*, 1 Camp. N. P. C. 327; 2 H. Bl. 377. But it is now settled, that he may be nonsuited after a plea of tender. *Anderson v. Shaw*, 3 Bingh. 290; and see Mr. Campbell's note, 1 Camp. 327.||

{Nor will the court order any part of the money to be restored to the defendant, though he paid *through mistake* a larger sum than the amount of the plaintiff's debt, if no fraud or deceit was practised on him.

2 Bos. & Pul. 392, *Vaughan v. Barnes*; 2 Term, 645, *Malcolm v. Fullarton*.}

(I) The Consequences of a *Profert in curia*.

In an action of *assumpsit* the defendant pleaded a tender, and brought four guineas into court. The plaintiff replied a demand and refusal subsequent to the tender. Issue being thereupon joined, it was found for the defendant. The defendant afterwards moved to take the money out of court; but it was refused. And by the court—He has admitted that this money was due to the plaintiff, and he is no more entitled to have it again, than if it had been brought into court upon the common rule, and stricken out of the declaration.

Stra. 1027, Cox v. Robinson.

There is, perhaps, no case of nonsuit which is expressly to this point.

But it is laid down, that, if after money has been brought into court upon the common rule, the plaintiff be nonsuited, he is entitled to the money; and it seems as reasonable that the plaintiff should be entitled to it after having been nonsuited in the case of a tender with a *profert in curia*, as in the case of bringing in money upon the common rule.

Salk. 597, Elliot v. Callow; Rep. of Pr. in C. B. 36.

If the plaintiff take issue upon the tender, and it be found against him, the defendant shall have the money again; for it was at the plaintiff's peril to take an issue, by the finding of which his refusal is become matter of record.

1 Inst. 207; Bro. *Tout temps prist*, pl. 32; Sty. 388; Salk. 597.

{The plaintiff may take the money out of court, though he reply that the tender was not made before action brought.

1 Bos. & Pul. 332, Le Grew v. Cooke.}

In any case, wherein the plaintiff is entitled to the money or other thing which has upon a plea of tender been brought into court, he must, in case he does take it out of court, pay the defendant costs.

If a plaintiff have proceeded in his suit, after money was brought into court upon a plea of tender, he cannot afterwards take the money out of court without the leave of the court.

||See Tidd's Prac. 627, (9th edit.)||

The plaintiff, after replying to a plea of tender, took the money which had been brought in, out of court, and entered an acquittal. It was holden, that as the replication amounted to a refusal of accepting the money, the plaintiff could not afterwards take it out of court, and enter an acquittal without leave of the court.

Barnes, 357, Hill v. Williams.

But the court will always give a plaintiff leave to do this upon paying the defendant costs.

Barnes, 357, Hill v. Williams. {The plaintiff may before trial have leave to take out the money with the costs to the time of paying it in, on paying the defendant his *subsequent* costs. Willes, 191, Davis v. Mansell; *post*, p. 346, 348.}

If the plaintiff take the money, or other thing which has been brought in, out of court, he cannot afterwards proceed for damages, on the account of a demand and refusal subsequent to the tender: for as the judgment which ought, in such case, to be entered up, is *quoad* the defendant *eat inde sine die*, the plaintiff is barred from having judgment of the principal; and a man cannot proceed for damages merely accessory, after being barred of the principal in any action, except an ejectment, wherein the term expires pending the action.

Cro. Ja. 126; Ld. Raym. 643, 774.

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(K) Of bringing Money into Court, &c.

{If the defendant in an action on a policy of insurance pay money into court under a rule as the amount of the premium, the plaintiff, by taking it out, will not be precluded from proceeding for a total loss, when he informs the defendant's attorney at the time of his intention to go for a total loss.

1 Johns. Rep. 192, *Sleight v. Rhinelanders*.}

{But the plaintiff may take the money out, though he reply that the tender was not made before action brought; and the case in *Barnes*, 357, is denied to be law by Buller, J., who said, that whatever became of the action the plaintiff was entitled to the money.

Le Grew v. Cooke, 1 Bos. & Pul. 332.}

(K) Of bringing Money into Court upon the common Rule.

MONEY cannot be brought into court upon the common rule without leave of the court.

The practice of giving leave to bring money into court upon the common rule is not very ancient.

Holt, C. J., is reported to have said, that he remembered the time when motions for leave to do this were first made.

Salk. 597. {The practice appears to have originated in the reign of Charles II., when Kelyng was Chief Justice, to avoid the hazard of pleading a tender. 1 Will. Saund. (5th ed.) 33 a, note 2; Tidd's Prac. 619, (9th ed.)}

The practice was introduced for the sake of giving a party who had never had it in his power to make a tender, or had neglected to make one, an opportunity of satisfying the debt for which an action had been commenced; and likewise to deliver him from the difficulty of pleading the tender, if he had made one.

Stra. 787, *White v. Woodhouse*.

Money cannot be brought into a court of equity, but a tender may be relied upon in the answer to a bill in equity.

Bunb. 28, 47. {When the defendant in his answer admits there is trust-money in his hands, on an interlocutory application, the court will order it to be paid into court. *Rothwell v. Rothwell*, 2 Sim. & Stu. 217. See *Peacham v. Daw*, 6 Mad. 98; *Clarkson v. De Peyster*, *Hopk.* 274; *Anon.*, 4 Sim. 359; *Matter v. Starkie*, 1 Russ. 476; *Orrok v. Binney*, *Jac. R.* 523; *Johnson v. Aston*, 1 Sim. & Stu. 73; *Morrissey v. Foley*, 2 Moll. 346; *Chase v. Manhardt*, 1 Bland, 343; *M'Kim v. Thompson*, 1 Bland, 156; *Reed v. Harris*, 7 Sim. 639; *Dubless v. Flint*, 4 My. & Craig, 502; *Price v. Church*, 1 Clarke, 358.}

The sum of money which is to be brought into court upon the common rule, is always mentioned in the rule.

Money cannot be brought into court upon the common rule, after the defendant has pleaded.

{But see 1 Johns. Rep. 149, *Dunlap & Grant v. Commercial Ins. Co.*}

If a party have obtained the common rule to bring a certain sum of money into court, the court will not give him leave, after having pleaded, to bring in more money than is mentioned in the rule.

A defendant, who had obtained the common rule to bring seventy-nine pounds and one shilling into court, afterwards moved for leave to bring in one pound and four shillings more; but it appearing that he had pleaded, the court refused to give leave to do this.

Green v. Beaton, *Barnes*, 286.

A defendant, who had obtained the common rule for bringing money

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into court, brought the sum therein mentioned into court. The plaintiff refused to accept thereof; and issue was joined in the action. Afterwards the defendant applied for another rule, to make an addition to the sum brought in. No rule was granted. And by the court—This was a subterfuge of the defendant, to try if the plaintiff would accept less than is due; and as this would not do, he now wants to bring more money into court, which the court never gives leave to do, after issue is joined in an action.

Barnes, 282, *Swan v. Freeman*.

If there are three counts in a declaration, the defendant may have a rule to bring money into court upon one, and plead to the other two.

Barnes, 286, *Hellier v. Hallet*.

But he cannot in such case have a rule to bring money into court upon one count, to plead to another, and to demur to the third.

Rep. of Pract. in C. B. 48; ||Tidd's Pract. (9th ed.) 621.||

The common rule for bringing money into court is very seldom granted without annexing the condition of paying costs.

But, as the old form of the common rule for bringing money into court is not compulsory, as to the payment of costs, in case the plaintiff shall think proper to accept the money, the Court of King's Bench, in which court the old form is still adhered to, will not grant an attachment for the non-payment of costs.

In an action of *assumpsit* the defendant brought eight pounds into court, upon the common rule. The plaintiff took it out, and, after taxing costs, demanded them. As these were not paid, he went on to trial, and obtained a verdict for seven pounds eighteen shillings. It was insisted, that as the plaintiff was overpaid by the money taken out of court, he ought not to have costs of the proceedings subsequent to the bringing of it in: but the court held, that this case was to be considered, the terms of the rule not having been complied with, as if no rule had been made; and that in such case it is not usual to grant an attachment, but the plaintiff, as the rule is only a conditional one, may go on. The *postea* was ordered to be delivered to the plaintiff; but it was ordered that he should, upon taking out execution, deduct for the money he had taken out of court.

Stra. 1220, *Hand v. Dinely*; ||7 Term R. 6; 11 East, 319, where Lord Ellenborough said the plaintiff might have required words of obligation to be inserted in the order, as are frequently done.||

The old form of the common rule for bringing money into court, having been adjudged by the Court of Common Pleas defective, for want of being compulsory upon the defendant as to the payment of costs, in case the plaintiff shall think proper to accept the money, it has been, of late years, altered, so as to be compulsory; and, consequently, an attachment against the defendant may be had in that court, if the costs are not paid.

Barnes, 283; ||2 New R. 473; and so also is the practice in the Exchequer. 6 Price, 126; 7 Price, 674.||

A case may be so circumstanced, that the court will give leave to bring money into court upon the common rule, without annexing the condition of paying costs, in case the plaintiff shall think proper to accept the money.

In an action of debt for rent, it appeared that there had been a tender of the rent before it was due; that the plaintiff had kept out of the way all the day on which it did become due, in order to deprive the defendant of an opportunity of tendering the rent that day; and that the action was com-

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menced the next day. The defendant, who had before obtained the common rule to bring money into court with costs, in case the plaintiff shall think proper to accept the money, afterwards obtained another rule, that the plaintiff might, instead of receiving costs, pay the defendant costs. The latter rule was afterwards discharged; but so much of the former rule as related to costs was discharged likewise.

MS. Rep. *Johnson v. Holditch*, East. 31 G. 2, in K. B.; 1 Burr. 578, S. C. ||Vide Tidd's Prac. 623, (9th ed.)||

And by Lord Mansfield, Chief Justice—Upon the particular circumstances of a case, the court has a power, although the general rule be otherwise, to give leave to bring money into court upon the common rule, without costs; and the present, wherein the plaintiff kept out of the way on purpose to avoid a tender of the rent, is a proper case to give such leave in. It is, in the general, of course to allow costs, where leave is given to amend; but the court may, upon the particular circumstances of a case, give leave to amend without costs. And by Dennison, J.—The court has certainly a power, where the justice of a particular case requires it, to dispense with a part of one of its rules, which can only be adapted to general cases. And by Foster, J.—There is, perhaps, no case where costs are more generally given, than upon the granting of a new trial; and yet a case may be so circumstanced as to make it proper for the court to grant a new trial, without annexing the condition of paying the costs of the former trial. And by Wilmot, J.—The circumstances of this case are so peculiarly hard, that the court ought to go as far as, by the rules of law, it can, in granting relief. If the first application had been for leave to bring money into court upon the common rule, without costs, I should have been for giving it; and I see no reason why it should not be now given.

||So also where an action was brought for two separate sums of money, one of which the defendant offered to pay, with all costs to that time, and the plaintiff's attorney having refused to stay proceedings on those terms, the defendant paid that sum into court; but the plaintiff, afterwards finding that he could not support the action for the other part of the demand, took the money out of court, and discontinued the action; the court allowed the defendant his costs from the date of the offer to pay the sum paid into court, and directed that the same should be set off against the plaintiff's costs previously incurred.

James v. Raggett, 2 Barn. & A. 776; 1 Chitt. R. 471.||

(L) At what Time Money may be brought into Court upon the common Rule.

A DEFENDANT is not so in court, until bail is put in, as to be able to move for leave to bring money into court upon the common rule.

7 Mod. 140, Anon. βThe clerk of the court is not authorized to receive money for the purpose of payment into court, without a rule. *Baker v. Hunt*, 1 Wend. 103.γ

The court will, in some cases, give a defendant leave to withdraw his demurrer, and bring money into court upon the common rule.

The defendant having demurred to the declaration, and assigned for cause the want of pledges, the plaintiff joined in demurrer. The defendant afterwards moved for leave to withdraw his demurrer, and to bring money into court upon the common rule; which was granted.

Barnes, 162, *Littledale v. Bosanquet*.

Money may be brought into court upon the common rule, at any

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time before the defendant has pleaded, although the rule for pleading be out.

Barnes, 279, Anon. ; Ld. Raym. 398.

The general rule is, that although a defendant have obtained the common rule for bringing money into court, he cannot bring the money in after he has pleaded.

The common rule for bringing money into court was discharged, because the defendant did not bring in the money before he pleaded.

Barnes, 281, Straphon v. Thompson.

A motion being made for leave to withdraw a plea of tender, and to bring money into court upon the common rule, and plead the general issue, it was refused. And by the court—We never make a rule for bringing money into court after the defendant has pleaded, without the consent of the plaintiff.

Barnes, 349, Salmon v. Aldrich.

But the court will sometimes give leave to withdraw a plea, and bring money into court upon the common rule.

A motion was made for leave to withdraw the general issue, and after bringing money into court upon the common rule, to plead the same *de novo*, the defendant's attorney being dead before leave was moved for, as his client had desired it might be, for bringing in money, and the attorney's clerk having delivered the plea by mistake : leave was afterwards given. And by the court—The general rule is against giving leave to do this ; but, in a case like the present, the general rule ought to be dispensed with.

Barnes, 344, Usher v. Edmunds.

Since this case, which seems to have been determined upon the particular circumstances thereof, the practice has been, to give leave to withdraw a plea, and bring money into court upon the common rule, although there be no particular circumstance in the case.

The Court of King's Bench granted a rule to withdraw the plea of the general issue, in order to give the defendant an opportunity of bringing money into court upon the common rule.

Stra. 1271, Tarlton v. Wragg.

And a rule of the same kind has been granted in the Court of Common Pleas.

Barnes, 289, Phillips v. Barker.

|| In the King's Bench it is now frequently done after plea on obtaining a judge's order ; and in some cases it is expressly authorized, as in actions against magistrates, by 24 Geo. 2, c. 44, § 4.

1 Term R. 711 ; 7 Taunt. 33 ; and see 3 Barn. & C. 159 ; 4 Dow. & Ry. 776. ||

But whenever such a rule is granted, the court will take care that the plaintiff shall not be thereby delayed ; and, in order to prevent this, it is, wherever the case requires it, made a part of the rule, that the defendant shall take short notice of trial.

Stra. 1271 ; Barnes, 289, 362.

Money cannot be brought into court upon the common rule, after a judgment has been regularly signed.

Barnes, 281 ; Rep. of Pr. in C. B. 65. {Vide 1 Johns. Rep. 506, Hatfield v. Baldwin.}

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(M) Of pleading where Money has been brought, &c.

After a regular judgment had been set aside, upon the usual terms of paying costs, and pleading the general issue, the court was moved for leave to bring money into court upon the common rule: no rule was made. And by the court—Leave is never given to bring money into court upon the common rule after a judgment has been regularly signed.

Barnes, 281, Burgess v. Pollamounter.

(M) Of Pleading where Money has been brought into Court upon the common Rule.

It has been holden that a defendant, who has obtained the common rule for bringing money into court, can only plead the general issue.

After money had been brought into court upon the common rule, the defendant obtained a rule to plead double, *non assumpsit* and *non assumpsit infra sex annos*. The plea was afterwards set aside. And by the court—A defendant can in such case only plead the general issue.

Barnes, 339, Buck v. Warren.

But the contrary has been since holden.

In an action upon the case, wherein money had been brought into court upon the common rule, leave was given to plead the general issue, the statute of limitation, and a set-off.

Barnes, 286, Hellier v. Hallet. [Note, this was, as to *some* of the counts only; for, after payment of money into court, generally, the defendant cannot plead the statute of limitations. Mead v. Wyndham, Bunb. 100.]

After an executor had obtained the common rule for bringing money into court, leave was given to plead *plene administravit*, together with the general issue.

Barnes, 287, Austin v. Ross.

It is, in the general, true, that the defendant cannot bring money into court upon the common rule, as to part of the plaintiff's demand in one count, and plead as to the residue of the demand.

In an action of trover for a bill of exchange for a hundred pounds, the defendant moved for leave to bring fifty pounds into court, and have that sum stricken out of the declaration; and to plead not guilty as to the residue: no rule was made. And by Holt, Chief Justice—It may happen that the plaintiff has a good cause of action for part of his demand, and a probable one for the residue; in which case it would be very hard to strike the former out of the declaration, and put him to try the latter at the peril of costs.

12 Mod. 90, Burman v. Shepherd; Comb. 357.

In an action of covenant, several breaches were assigned, one of which was the non-payment of rent. The court was moved, that, upon bringing ten pounds into court, the breach, as to the non-payment of rent, might be stricken out of the declaration, and that the defendant might plead as to the residue. No rule was made. And by the court—Whenever it appears that the plaintiff has a just cause of action as to one thing, we will not put him to try another, at the peril of costs.

12 Mod. 95, Pawlett v. Heatfield.

But if there are two or more counts [or breaches] in a declaration, the defendant may have the common rule to bring money into court as to one or more of them, and to plead as to the other or others.

In an action upon the case, wherein there were nine counts, the defend-

(N) Consequences of bringing Money into Court, &c.

ant obtained the common rule to bring money into court upon two of them, and had leave to plead the general issue, the statute of limitation, and a set-off, as to the others.

Barnes, 286, *Hellier v. Hallet*.

[So, where an action of covenant was brought upon a lease for non-payment of rent, and not repairing, &c., the court made a rule, that upon payment of what should appear to be due for rent, the proceedings as to that should be stayed; and as to the other breaches, the plaintiff might proceed as he should think fit.

2 Salk. 596; 1 Wils. 75.

So, in covenant upon a charter-party, the defendant was allowed to bring money into court, upon two of the breaches only, viz., for freight and demurrage.

Baillie v. Cazelet, 4 Term R. 579.]

If a defendant have obtained the common rule for bringing money into court upon one count, he cannot demur to any other count in the declaration; for the design of permitting money to be brought into court is to put an end to the cause.

Rep. of Pract. in C. B. 48, *Thames v. Osey*.

If the plaintiff, where the common rule for bringing in money upon some counts in a declaration has been made, think proper to accept the money, he is entitled to costs upon all (*a*) the counts.

Barnes, 286, *Hellier v. Hallet*. [(*a*) He is not entitled to the costs upon all the counts, but only upon those on which the money has been paid. 4 Term R. 579;] ||2 H. Black. 550.||

(N) The Consequences of bringing Money into Court upon the common Rule.

WHENEVER leave is given to bring money into court upon the common rule, part of the rule is, that unless the plaintiff shall accept thereof, together with costs, to the time of bringing it in, in full discharge of the action, the said money to be paid to the plaintiff, and to be stricken out of the declaration; and upon the trial of the issue, the plaintiff shall not be permitted to give any evidence as to the said money.

After the defendant has brought into court, on the common rule, as much money as he thinks proper, and the plaintiff has refused to receive it in satisfaction, the defendant is entitled to have the same considered as a payment made on the day on which it was brought in, for then he stands on the same ground as if, on tendering the money before the action, the plaintiff had refused to receive it, and had commenced his action, in which the tender was pleaded.

Boyden v. Moore, 5 Mass. 365.

When the defendant brings money into court, the plaintiff goes on to trial, and a verdict is rendered against him, he neither pays nor receives costs for the time previous to the payment of money into court.

Williams v. Ingersoll, 12 Pick. 345.

When money is paid into court generally, it is an admission of the contract set forth in each of the counts; but if the payment was not intended to be made on all the counts, an amendment of the rule will be allowed, so as to apply it to particular counts.

Jones v. Hoar, 5 Pick. 285; *Huntington v. American Bank*, 6 Pick. 340.

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A plaintiff is in almost (a) all cases entitled to the money brought into court upon the common rule.

[(a) *Qu.* Whether the plaintiff be not entitled to it in *all* cases; for, being an acknowledgment on record, the defendant can never recover it back again, though it afterwards appear that he paid it wrongfully. 2 Term R. 645.] ¶ And even if the money be paid by mistake, the court will not order it to be restored to defendant, though perhaps it would be otherwise in case of fraud. 2 Bos. & Pul. 392; but see 1 Bing. 103; 7 Moo. 332, S. C.; and see Tidd's Prac. 628, (9th ed.)] β The plea of tender admits the plaintiff's cause of action to the amount of the sum tendered. *Eddy v. O'Hara*, 14 Wend. 221: Payment of money into court is a payment *pro tanto*, and the plaintiff has a right to take it out. *Murray v. Bethune*, 1 Wend. 191. See *Bank of Columbia v. Southerland*, 3 Cowen, 336; *Johnson v. Col. Ins. Co.*, 7 Johns. 315; *Spalding v. Vandercook*, 2 Wend. 431; *Sleight v. Rhinelander*, 1 Johns. 192. But money paid into court in a bill of redemption cannot be taken out by the defendant, if he disputes the right to redeem, and prevails in his defence. *Putnam v. Putnam*, 13 Pick. 139.γ

After ten pounds had been brought into court upon the common rule, the plaintiff was nonsuited. A question hereupon arose, Whether the plaintiff was entitled to have the money out of court? It was holden that he was. And by the court—So much the defendant has, by bringing it into court, admitted to be due.

Salk. 597, *Elliot v. Callow*; Rep. of Pr. in C. B. 36.

Upon a motion in arrest of judgment, the judgment was arrested; yet the court ordered that a sum of money, which had been brought into court upon the common rule, should be paid to the plaintiff.

Barnes, 284, *Fisher v. Kitchingham*.

But if a suit abate by the death of the plaintiff, the court has not yet gone so far as to order the money which had been brought into court upon the common rule to be paid to his executor.

Barnes, 281, *Crokay v. Marton*.

As the court will not, however, even in such case, order the money which was brought into court to the plaintiff's use to be paid out again to the defendant, the most prudent way is, for the defendant to consent that, upon an undertaking by the executor of the plaintiff not to bring another action for the same cause, the money may be paid to him: for if a new action be brought by the executor, the defendant must apply to have the money which is in court transferred for payment in this action, and must pay costs therein.

Barnes, 281, *Crokay v. Marton*. ¶ See Tidd, 628, (9th ed.)

Although a plaintiff has proceeded in his suit after the bringing in of money upon the common rule, he may afterwards have a rule to stay his own proceedings, and take the money out of court.

Barnes, 282, 284, 285.

The defendant had brought money into court upon the common rule. The plaintiff, refusing to accept thereof, delivered an issue with notice of trial for the next assizes; but he afterwards countermanded the same. In the next term, the defendant served him with a rule, to enter the issue upon record. Hereupon a rule was made, that the plaintiff might take the money out of court, with costs to the time of bringing it in.

Barnes, 287, *Bate v. Crane*.

But, whenever such a rule is made, the plaintiff must pay the defendant his costs subsequent to the time of bringing the money into court; and it is usual to make it part of the rule, that such costs shall be paid out of the

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money which has been brought in ; and if the money in court be not sufficient for this purpose, that the plaintiff shall make good the deficiency.

1 Barn. 98, 201 ; 2 Barn. 230, 235.

||The rule to bring money into court is commonly drawn up with costs to be taxed by the master in the King's Bench, or a prothonotary in the Common Pleas ; and in the King's Bench, the court will not in general permit the defendant to bring into court the debt and costs up to a certain day, after action brought, (thereby excluding the costs of declaration,) on the ground of an offer to pay debt and costs up to that period, without having made a tender before action, or obtaining the common rule for staying proceedings on payment of debt and costs, up to the time of the application.

3 East, 551.

But where the plaintiff's conduct appeared to have been oppressive, the Court of King's Bench, on motion, discharged so much of the rule for the bringing money into court as related to the payment of costs.

1 Burr. 578.

So, where an action was brought for two separate sums of money, one of which the defendant offered to pay with all costs to that time, the plaintiff's attorney refused to stay proceedings on those terms, and the defendant paid that sum into court ; but the plaintiff afterwards finding that he could not support the action for the other part of his demand, took the money out of court and discontinued the action ; the court allowed the defendant his costs from the date of his offer to pay the sum paid into court, and directed the same to be set off against the plaintiff's previous costs.

2 Barn. & A. 776.

So, in the Common Pleas, according to several recent decisions, where the defendant, after action brought and before declaration, offers to pay the debt and costs, and the plaintiff refuses to receive it, the court will permit the defendant to pay the debt into court with the costs of the action up to the time of his offer only ; and if the plaintiff take the money out of court, he will be compelled to pay the costs of the application, and all costs in the action, subsequent to the offer.

2 Taunt. 203, 283 ; 4 Taunt. 255.

And, in like manner, upon setting aside a writ of inquiry, the Court of Common Pleas permitted the defendant to pay money to the plaintiff under a rule of court, with the costs of the action up to that time, and ordered that the plaintiff's further proceedings should be at the peril of paying the subsequent costs.

1 Taunt. 491 ; and see 5 Taunt. 840 ; 2 Marsh. 478 ; Tidd's Prac. 644, 5, (7th ed.)||

If money has, in an action against an executor, been brought into court upon the common rule, and the plaintiff is afterwards nonsuited, or there is a verdict against him, the defendant shall have the money out of court again ; because, being an executor, he might not know whether his testator was indebted to the plaintiff or not.

Rep. of Pr. in C. B. 5, Anon.

A defendant, who has brought money into court upon the common rule, is not entitled to have it out of court again, although there be a verdict for

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him ; for he has admitted the sum brought in to be due to the plaintiff, and so much has been stricken out of the declaration.

Stra. 1027; Cox v. Robinson, Rep. of Pr. in C. B. 5. ||2 Term R. 645; 2 Bos. & P. 392.||

If a suit abate, after money has been brought into court upon the common rule, by the death of the defendant, his executor is not entitled to have the money out of court again.

Although the plaintiff is entitled to the money which has been brought into court upon the common rule, it is usual for the court, if there be a verdict for the defendant to order it, provided the sum do not exceed what is due to the defendant for costs, to be paid to him on account thereof.

1 Barn. 199; Anon., Rep. of Pr. in C. B. 54; {1 Bos. & Pul. 333.}

A motion was made, upon an affidavit that the defendant was dead, to have ten pounds, which had been brought into court by him upon the common rule, paid out of court to his executor: but it was denied.

Barnes, 279, Knapton v. Drew.

[Although bringing money into court is an acknowledgment of the right of action to the amount of the sum brought in ; (a) yet beyond that amount it is no acknowledgment ; (b) and therefore if the plaintiff proceed to trial (c) otherwise, than for the non-payment of costs, and do not prove more to be due to him than the sum brought in, he shall, on (d) producing the rule, be nonsuited, or have a verdict against him, and pay costs to the defendant. (e) But if more appear to be due to him, he shall have a verdict for the overplus, and costs. (g) Where the plaintiff proceeds further, without going on to trial, he shall have his costs to the time of bringing the money into court ; and the defendant shall be allowed his subsequent costs. (h)

Tidd's Pr. 415, 416. (a) 5 Burr. 2640; 2 Term R. 275. (b) 1 Term R. 464. {It admits *the contract as laid* in the count on which it is paid, leaving only the amount of the damages incurred by the breach of it open to dispute. If, however, the contract stated be illegal, the plaintiff cannot recover beyond the sum paid in ; because the defendant's admission cannot conclude the court to make them give effect to an illegal contract. Id. *ibid.* 2 H. Black, 374, Gutteridge v. Smith ; 2 East, 128, Yate v. Willan ; 9 East 325, Andrews v. Palsgrave ; 1 Bos. & Pul. 264, Ribbans v. Crickett ; 2 Bos. & Pul. 550, Bennett v. Francis ; 3 Bos. & Pul. 556, Muller v. Hartshorne ; Peake N. P. 15, Middleton v. Brewer ; 1 Esp. Rep. 347, Guillod v. Nock. Payment into court by an infant does not preclude him from availing himself of his infancy. 2 Esp. Rep. 481, n., Hitchcock v. Tyson.} (c) 2 Salk. 596 ; 2 Stra. 1027 ; Ca. temp. Hardw. 206 ; Say. R. 196, 197 ; 2 Burr. 1121. (d) 5 Com. Dig. 20. (e) 4 Term R. 10 ; 1 Term R. 710, *semb. contra.* (g) Ca. temp. Hardw. 260. (h) 1 Term R. 629 ; {Willes, 191, Davis v. Mansell ;} Say. Rep. 196, *contra.*

If, after the defendant has brought money into court, the plaintiff proceed to trial, and a juror be withdrawn by consent, the plaintiff is not entitled to costs up to the time of bringing the money into court.

Stodhart v. Johnson, 3 Term R. 657.]

||Nor in case the defendant obtain judgment, as in case of a nonsuit, or judgment of *non pros.* for not entering the issue.

2 Maul. & S. 335 ; 6 Taunt. 158 ; 1 Marsh. 510 ; 1 Younge & J. 213.

In the Exchequer, the plaintiff is entitled to such costs, though he has made default in trying the cause after a peremptory undertaking, and he may take the money out of court without an application for that purpose.

Tidd, 627, 21, (9th ed.)

Bringing money into court is in general considered an acknowledgment

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of the right of action to the amount of the sum brought in, (a) but it is an admission of a legal demand only ; (b) and in actions against justices, &c., for actions done *ex officio*, it seems to be no admission of a cause of action. (c) And where money has been paid into court, short of the plaintiff's demand, and it is taken out of court, evidence is admissible to show *quo animo* it was done, and it is not a conclusive admission that the rest of the demand was unfounded. (d)

(a) Burr. 2640 ; 2 Term R. 275. (b) 1 Bos. & P. 264. (c) 13 East, 202, 203 (d) 5 Espin. N. P. C. 69.

When the declaration contains a count on a special contract, bringing money into court *generally*, is an admission of the contract so as to supersede the necessity of proving it at the trial.

2 Term R. 275 ; 4 Ibid. 579 ; 2 East, 128 ; 3 B. & P. 556 ; 2 B. & P. 550 ; 3 Taunt. 95.

So, where the defendant paid money into court generally, upon a declaration containing a count on a policy of assurance, together with the money counts, the Court of King's Bench held that this was an admission of the contract stated in the special count.

9 East, 325.

And payment of money into court by defendant, in an action on 2 & 3 Edw. 6, c. 13, by a farmer of tithes, is an admission of the plaintiff's title to the tithes.

4 Price, 58 ; and see 3 Taunt. 95.

But in an action on a valued policy, the payment of money into court upon a count which states a total loss by capture is no admission of a total loss, but the plaintiff must prove that he has suffered damage beyond the amount paid into court.

1 Camp. R. 557 ; 1 Taunt. 419, S. C.

So, payment of money into court on several common counts, one of which is alone applicable to the plaintiff's demand, admits a right of action on that count only.

9 Moo. 724 ; 2 Bing. 377.

So, where the plaintiff alleges in his declaration multifarious and inconsistent demands, arising out of the same transaction, payment into court of a sum insufficient to meet all the demands cannot be applied by the plaintiff to prove such one of them as he may elect at the trial.

7 Taunt. 450 ; 1 Moo. 158, S. C.

And where the declaration stated that the plaintiff had sold to the defendant a quantity of oak bark, at the average price of the season, to be ascertained before a given day, and then averred that the average price was ascertained to be a given sum, it was holden that the payment of money into court did not admit the average price to be as stated.

2 Barn. & A. 116.

And in *assumpsit* for goods sold and delivered, and on the money counts where the defendant had pleaded the general issue, and the statute of limitations, and paid money into court generally, the court held that such payment did not take the case out of the statute.

3 Barn. & C. 10 ; 4 Dow. & Ry. 632, S. C. ; and see Tidd, 626, (9th ed.)

And where the money is paid merely on *indebitatus* counts, it is no admission of any thing being due beyond the sum paid in.

Seaton v. Benedict, 5 Bing. 28.

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(O) In what Cases a Tender may in the general be made, &c.

The effect of all the cases upon the subject is, that the defendant, by paying money into court, admits every thing which the plaintiff would be obliged to prove in order to recover that money, and nothing more ; therefore, where one contract was stated in one count of a declaration, and two breaches were assigned on it, and the defendant paid money on one of the breaches, it was held that he thereby admitted the whole *contract* set out in that count.

Dyer v. Ashton, 1 Barn. & C. 3.

(O) In what Cases a Tender may in the general be made, or Money may be brought into Court, upon the common rule.

[(See Head (P) in the several Divisions.)]

HITHERTO tender and bringing money into court upon the common rule have had a distinct consideration : but it may be as well to treat of them, under this and the following head, jointly : because the greater part of the matter which falls properly under these two heads is so blended in the books, that it cannot, without some difficulty and much repetition, be separated ; and perhaps the separation would not in the least tend to the illustration of either subject.

It is, in general, true, that, whenever one person has a right to a certain debt or duty from another, a tender may be made.

This might be illustrated by an infinity of cases ; but the reason of the thing, namely, that it should not be in the power of one man to vex another, by suing for a certain debt or duty which the other has offered to satisfy, speaks so strongly, as to make it unnecessary to adduce any.

It will, moreover, in treating of tender in particular actions, appear that, in almost every instance where a tender cannot be made, it is owing to the uncertainty of the debt or duty that it cannot in such instance be made.

But although a tender may be made in every case wherein the debt or duty is certain, it is not necessary to make one in every such case.

If the obligation precede the duty, as where a bond is with condition to pay a sum of money, or an annuity, neither of which was before due, a tender must, to save the penalty of the bond, be made : but if the duty precede the obligation, as where a bond is with condition to pay a rent-charge which was before due, no tender is necessary ; for it is sufficient that the party be ready to pay this when it is demanded upon the land.

Bro. *Tend.* pl. 22 ; 7 Rep. 28 ; Hob. 207 ; 12 Mod. 414.

So, if an executor enter into a bond, with condition to perform a will, he is not thereby bound to tender a legacy given by the will ; but the legacy remains, as it was before, payable upon request.

Leon. 17, *Fringe v. Lewes* ; 12 Mod. 414.

In almost every action wherein a tender might, before it was commenced, have been made, money may be brought into court upon the common rule.

It was formerly holden that money could not be brought into court upon the common rule in an action wherein an executor or administrator was plaintiff, because neither of these is liable to costs.

6 Mod. 29, *Anon.* ; Salk. 596.

Afterwards, the practice was, in an action brought by an executor or

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administrator, to make a rule upon the plaintiff to show cause why he should not accept the debt and costs.

Barnes, 279, Bryan v. Holloway.

But it has since been holden that money may be brought into court upon the common rule, where an executor or administrator is plaintiff; for that, although the plaintiff cannot be thereby made liable to pay costs, he ought to be prevented from obtaining costs subsequent to the time of bringing in the money.

Stra. 796, Crutchfield v. Scot; [Bunb. 44, Knight v. Duchess of Hamilton, S. P.]

||In actions against justices of the peace,(a) or officers of the excise,(b) or customs,(c) commissioners of bankrupt,(d) officers of the army, navy, and marines,(e) for any thing done in execution of their offices, "in case the defendants shall have neglected to tender any, or shall have tendered insufficient amends before action brought, they may, by leave of the court, at any time before issue joined, pay into court such sum of money as they shall see fit, whereupon such proceedings, orders, and judgment shall be had and given in and by such court as in other actions where the defendant is allowed to pay money into court."(g)

(a) 24 G. 2, c. 44, § 4. (b) 23 G. 3, c. 70, § 33. (c) 24 G. 3, sess. 2, c. 47, § 35, repealed by 6 G. 4, c. 105; 28 G. 3, c. 37, § 28; 6 G. 4, c. 108, § 98. (d) 6 G. 4, c. 16, § 43. (e) 6 G. 4, c. 108, § 96. (g) See also 13 G. 3, c. 78, § 79; 13 G. 3, c. 84, § 81, and 3 G. 4, c. 126, § 144, as to bringing money into court by persons acting under the general highway and turnpike acts. As to bringing it in by persons acting in pursuance of the laws relative to larceny and malicious injuries to property, see statutes 7 & 8 G. 4, c. 29, § 75; 7 & 8 G. 4, c. 30, § 41.||

The common rule for bringing money into court may be had in some cases where no tender could have been made.

If a sum of money be given as a penalty, by a statute, to any person who will sue for the same, an offender against the statute is liable to pay the money to the person who does sue for it: but no tender could have been made in this case; because a tender can never be made after an action is commenced, and it could not be known, until the action was commenced, that the offender would have been liable to pay the money to the person who has brought the action.

But the court will, after an action is commenced for a sum of money given as a penalty by a statute, give leave to bring money into court upon the common rule.

Stra. 1217, Webb *qui tam* v. Poulter; [2 Black. R. 1052, Stock v. Eagle;] ||Tidd's Prac. 541, 9th ed.)||

(P) Of tendering and bringing Money into Court upon the common Rule in particular Actions.

1. In an Action of Assumpsit.

It is, in the general, true, that money cannot be brought into court upon the common rule in an action of *assumpsit*; because the damages which may be recovered in such action are for the most part uncertain.

In an action of *assumpsit* against a master of a ship, for damages sustained by his not delivering some jars of oil safe and in as good condition as he received them, a motion was made for leave to bring money into court upon the common rule, at the rate of sixpence *per* jar. No rule was made. And by Lord Mansfield, Chief Justice—Wherever, in an action

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of *assumpsit*, the damages are, as in the present case, uncertain, the court never gives leave to bring money into court upon the common rule.

MS. Rep. East. 30 G. 2, *Buckholden v. Hampton*.

[But, in an action of *assumpsit* against a carrier, for not delivering goods, the defendant having advertised that he would not be answerable for any goods beyond the value of twenty pounds, unless they were entered and paid for accordingly, he was allowed to bring the twenty pounds into court.

Hutton v. Bolton, E. 22 G. 3, *Tidd's Pr.* 641, (7th edit.); 2 East, 128.]

||So, money may be brought into court in an action for navigation calls. But in *assumpsit* for not delivering goods bought, or for not safely carrying them, where the damages are unliquidated, money cannot be paid into court. And it cannot be brought in an action for dilapidations.

7 Term R. 36; 2 Bos. & P. 234; 3 Bos. & P. 14; 8 Term R. 47; and vide further *Tidd's Prac.* 941, 942, (7th edit.)||

It is laid down in one case, that money may be brought into court upon the common rule in an action of *assumpsit* upon a count for a *mutuatus*.

7 Mod. 141, *Anon.*, Hil. 1 Ann.

But, in a latter case, where an action was brought upon a bill penal, and a count was added for a *mutuatus*, it was holden that money could not be brought into court upon the common rule upon this count.

Barn., *Pierce v. Saunders*.

It was formerly holden that no tender could be made in an action of *assumpsit* upon a count for a *quantum meruit*, by reason of the uncertainty of the damages which may, on such count, be recovered.

Ld. Raym. 255, *Gyles v. Hartis*.

A motion being made for leave to bring money into court upon the common rule, in an action of *assumpsit* wherein there was one count upon an *indebitatus assumpsit*, and another upon a *quantum meruit*, the court gave leave to do it as to the former count, but not as to the latter. And by the court—Who can tell what a man deserves till it be tried?

12 Mod. 187, *Smith v. Johnson*.

But it has been since holden, that a tender may be made in an action of *assumpsit* upon a count for a *quantum meruit*; and it follows, of course, that money may now be brought into court in an action of *assumpsit* upon a count for a *quantum meruit*.

Stra. 576, *Johnson v. Lancaster*.

A tender may be made in all cases in an action of *assumpsit* upon a count for an *indebitatus assumpsit*; because the damages which may be recovered on such count are always certain.

Salk. 23, *Hard's case*; *Salk.* 597; 6 Mod. 128.

2. In an Action upon the Case.

Money cannot be brought into court upon the common rule in an action upon the case; because the damages which may be recovered in this action are uncertain.

It has been holden that money cannot be brought into court upon the common rule, in an action upon the case, for immoderately driving a hired chaise.

Stra. 787, *White v. Woodhouse*.

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In an action upon the case for dilapidations, the court refused to let money be brought in upon the common rule.

Stra. 906, *Squire v. Archer*; ¶*Salt v. Salt*, 8 Term R. 47.¶

¶So also in an action against the sheriff, for a false return to a writ of *fiery facias*.

Bowles v. Fuller, 7 Term R. 335.¶

By the 11 G. 2, c. 19, § 20, a tender may be made, before the commencement of an action upon the case, for any unlawful act done by a person who has distrained for rent justly due.

By the 17 G. 2, c. 38, § 10, a tender may be made, before the commencement of an action upon the case, for any irregularity in distraining for money justly due for the relief of the poor.

[Although, in an action for general damages, the bringing of money into court is irregular, yet, if the plaintiff takes it out, he thereby waives the irregularity, and cannot afterwards have a verdict, unless he recover more than the sum brought in.

Griffiths v. Williams, 1 Term R. 710;] ¶1 Camp. R. 559, n.¶

3. *In an Action of Covenant.*

It is, in the general, true, that money cannot be brought into court upon the common rule in an action of covenant; because this action, in general, sounds in damages.

1 Ventr. 356, Anon.; 1 Show. 130.

In an action of covenant for not doing repairs, it was holden that money could not be brought into court upon the common rule, the demand being in such case uncertain.

11 Mod. 270, Anon.; Salk. 596.

But wherever the damages sustained by the breach of covenant assigned are certain, money may be brought into court upon the common rule.

If the breach assigned in action of covenant be non-payment of rent, money may be brought into court upon the common rule, the demand being in such case certain.

Salk. 596, Anon.; ¶*Tidd's Prac.* 640, 641, (7th edition.)¶

In an action of covenant, the breach assigned was, the not having dressed corn well, and the damages were alleged to be eleven pounds. Upon a motion to bring this sum into court upon the common rule, the counsel for the plaintiff consented thereto, and admitted that the demand was in this case as certain as if the action had been for the non-payment of rent.

Barn., Walnough v. Houghton.

In an action of covenant upon a charter-party, one breach assigned was, the non-payment of money due for freight; another was, the non-payment of money due for demurrage. A rule was made for bringing money into court upon the common rule, as to these two breaches. And by Lord Mansfield, Chief Justice—The sensible distinction in such case is, that if the sum of money, which ought to be recovered, may be ascertained by computation, leave ought to be given to bring money into court; but where the sum of money cannot be ascertained by computation, but does, in some measure, depend upon the judgment of a jury, it is reasonable that the plaintiff should be at liberty to have such judgment, without being liable to costs in case it should be against him.

MS. R. *Hallet v. The East India Co.*, Hil. 1 G. 3, in K. B.; 2 Burr. 1120, S. C.

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||In covenant, debt, or other action upon a policy of insurance, the defendant may bring money into court by act of parliament.

19 G. 2, c. 37, § 7; 2 Taunt. 317; 57 G. 3, c. 99, § 43.

So also in an action for non-residence.||

4. In an Action of Debt.

It is, in the general, true, that money cannot be brought into court upon the common rule, in an action of debt.

If an action of debt be brought upon a judgment, the court will not permit money to be brought into court upon the common rule.

6 Mod. 60, *Burridge v. Fortesque*; 7 Mod. 114.

A motion being made for leave to bring money into court upon the common rule, in an action of debt upon articles, it was refused. And by Holt, Chief Justice—I never knew this allowed to be done in such case.

7 Mod. 141, *Anon.*

A defendant had obtained the common rule for bringing money into court, in an action of debt for the penalty of a charter-party: but it was afterwards discharged, as being contrary to the course of the court.

Barnes, 285, *Yeoman v. Ross*.

In an action of debt for goods sold, the court refused to let money be brought into court upon the common rule.

Stra. 890, *Leapridge v. Pongillionne*.

But in some actions of debt, money may be brought into court upon the common rule.

[There is a distinction between those actions of debt, wherein the plaintiff cannot recover less than the sum demanded; as, on a record, specialty, or statute, giving a sum certain by way of penalty, *Cro. Ja.* 128, 498, 629; 3 Mod. 41; and those actions wherein the plaintiff may recover less, as in debt for rent, 5 Mod. 212, or on a simple contract, 1 H. Bl. 249. In the former, the defendant cannot bring money into court, 2 *Stra.* 890; *Barnes*, 285; though he may move to stay the proceedings, on payment of the whole debt and costs, *Ca. temp. Hardw.* 173; 3 Burr, 1390; but in the latter, the defendant has been allowed to bring money into court, 1 Ventr. 356; 2 Salk. 596, 597, because the plaintiff does not recover according to his demand, but according to the verdict of the jury. *Tidd's Pr.* 619, (9th edition.)]

It is usual to allow money to be brought into court upon the common rule, in an action of debt for rent.

Barnes, 280, *Dixon v. Allen*; Salk. 596.

In an action of debt, wherein there was only one count, for a penalty of five pounds given by a statute, the court gave leave to bring the five pounds into court upon the common rule.

Stra. 1271, *Webb qui tam v. Punter*.

In a very late case, there was, in an action of debt, one count for twenty pounds, on account of the defendant's having had four partridges in his custody; and another count for other twenty pounds, on account of his having exposed four partridges to sale. A motion being made to pay twenty pounds into court upon the common rule, leave was given so to do.

MS. Rep. East. 31 G. 2; *Walker qui tam v. Keene*; ||2 Black. R. 1052.||

Money could, even before the statute, have been brought into court upon the common rule, in an action of debt upon a bond for the payment of a less sum; nay, it is said by Holt, Chief Justice, that the first instance of

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giving leave to bring money into court, was in an action of debt upon a bond for the payment of a less sum.

7 Mod. 141, Anon.; Salk. 596; 6 Mod. 60.

But the court never give leave to bring money into court upon the common rule, in an action of debt upon a bond of indemnity, or a bond for the performance of a collateral agreement.

12 Mod. 598, Coke v. Heathcot.

Heretofore the defendant, in an action of debt upon a bond for the payment of a less sum, who had obtained the common rule for bringing money into court, must have brought in the whole penalty of the bond.

Salk. 597, Anon.

This hardship is remedied by the 4 Ann. c. 16, § 13, it being thereby enacted, "That if, pending an action upon a bond, with condition to be void upon the payment of a less sum, the defendant shall bring into court all the principal money and interest due, and costs, the said money shall be taken to be a full satisfaction of the said bond, and the court shall give judgment to discharge every such defendant of the same."

It has been holden that, if an action of debt upon a bond for the payment of a less sum be brought by an executor or administrator, the case is within this statute; the words thereof being general.

Wright, Executor, v. Swayne, Barnes, 289.

An action of debt upon a bond to a sheriff, conditioned for the good behaviour of his bailiff, and, *inter alia*, for paying money collected for the sheriff's use, is not within the statute; because the bond is not for the payment of a less sum.

Atkins v. Taylor, Barnes, 285.

For the same reason, if an action of debt be brought upon a bond of indemnity, or upon a bond for the performance of a collateral agreement, money cannot, under the statute, be brought into court.

12 Mod. 598, Coke v. Heathcot.

A bond having been given to pay a sum of money by instalments, at the rate of five pounds *per annum*, the obligee, after the obligor had failed in making one payment, brought an action upon the bond. Hereupon a motion was made in the Court of King's Bench, that, upon bringing into court the five pounds, with costs, the proceedings in the actions might be stayed. No rule was made. And by the court—The defendant is not entitled, under the act of the fourth of Anne, to have the proceedings stayed, unless the whole money be brought into court; for it never could be intended that the obligee should be put to the trouble of bringing an action every year.

Stra. 515, Land v. Harris.

Since this case, the Court of King's Bench has, in two cases, given leave to bring the arrear of money due on a bond to pay by instalments into court, as being a case within the statute.

Stra. 814, Bridges v. Williamson; Mayne v. Somner, Hil. 4 G. 2. [See also Bonafous v. Rybot, 3 Burr. 1370, *acc.*]

But it has, in two subsequent cases, been holden by the same court, that, as the allowing of the arrear of money due upon a bond to pay by instalments, to be brought into court, can only be done by an equitable construction of the statute, the plaintiff, who ought not to be thereby deprived of

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any legal advantage, may sign judgment in the action upon the bond, with a stay of execution, until there is a failure in some future payment.

Stra. 597, *Darby v. Wilkins*; *Lucas v. London*, *Mich.* 11 G. 2; ||2 *Black. R.* 706; 2 *Taunt. R.* 387; 1 *Barn. & A.* 214.||

The Court of Common Pleas did, in a still later case, give leave to bring the arrear of the money due upon a bond to pay by instalments into court; and it does not appear, from the report of the case, that leave was given for the plaintiff to sign judgment in the action upon the bond as a security for any future payment.

Moss v. Hardy, Barnes, 288.

§ Where a bond is conditioned for the payment of money at a future day, with interest semi-annually, and it is provided that in default of payment of interest at the time specified, the whole of the debt, principal and interest, shall become due; and a default of interest happens, and an action is brought demanding the whole debt, the defendant is not entitled, on bringing in the arrears of interest with costs, to a rule for discontinuance, but is liable to payment of principal as well as interest.

People v. Superior Court of New York, 19 *Wend.* 104.g

[The defendant, by act of parliament, may bring money into court, in debt, covenant, or other action, on a policy of assurance.

St. 19 G. 2, c. 37, 3 *Burr.* 1773.]

5. In an Action of Ejectment.

As the only question which can arise in an action of ejectment is, Whether the plaintiff has a right to the possession of the premises thereby demanded? money cannot be brought into court upon the common rule in this action.

But a rule may, in some cases, be had, that, upon bringing a sum of money into court, the proceedings in an action of ejectment shall be stayed.

If an action of ejectment be brought, upon the forfeiture of a lease for non-payment of rent, the lessee, if he will make oath that his lease is not expired; may have a rule that, upon bringing into court the rent which is in arrear, the proceedings shall be stayed.

Comb. 299; *Salk.* 597.

By the 7 G. 2, c. 20, § 1, it is enacted, "That where any action of ejectment shall be brought by any mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any court of equity in that part of Great Britain called England, for the foreclosing or redeeming of such mortgaged lands, tenements, or hereditaments; if the person or persons having right to redeem such mortgaged lands, tenements, or hereditaments, and who shall become defendant or defendants in such action, shall bring into court all the principal moneys, and interest and costs, such money for principal, interest, and costs, to be ascertained by the court where such action shall be depending, or by the proper officer to be by such court appointed for that purpose, the moneys so brought into court shall be taken to be a full satisfaction of such mortgage, and the court shall discharge every such mortgagor or defendant of the same."

||*Vide* 7 *Term R.* 185; 4 *Taunt.* 887; *Adams on Ejectment*, 321, *et seq.*, 2d ed.||

But by § 3 it is provided, "That this act shall not extend to any case where the person or persons against whom the redemption shall be prayed shall, by writing, under his, her, or their hands, or the hands of his, her, or

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their attorney, agent, or solicitor, to be delivered, before the money shall be brought into such court of law, to the attorney or solicitor for the other side, insist that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other principal sums than what appear on the face of the mortgage or shall be admitted on the other side ; nor to any case where the right of redemption to the mortgaged lands and premises in question shall be controverted by different defendants."

6. *In an Action against a Justice of the Peace, on the Account of something done in the Execution of his Office.*

By the 24 Geo. 2, c. 44, § 2, it is enacted, "That it shall be lawful for any justice of the peace, within one calendar month after being served with a notice that some writ is intended to be sued out against him, or that a copy of some process is intended to be served upon him, for something done in the execution of his office, to tender amends to the party complaining, or to his or her attorney ; and in case the same be not accepted, to plead such tender in bar to any action to be brought on such writ or process, together with the plea of not guilty, and any other plea, with the leave of the court ; and if, upon issue joined, the jury shall find the amends so tendered sufficient, then they shall give a verdict for the defendant ; and in such case, or in case the plaintiff shall become nonsuit, or discontinue his action, or in case judgment shall be given for such defendant upon a demurrer, such justice shall be entitled to the like costs as he would have been entitled unto in case he had pleaded the general issue only."

[See similar provisions in actions against officers of the excise, 23 G. 3, c. 70, §§ 31, 32, 33, and customs, 24 G. 3, sess. 2, c. 47, § 35 ;] 6 G. 4, c. 105 ; and see 13 G. 3, c. 78, § 79 ; and 13 G. 3, c. 84, § 81 ; 3 G. 4, c. 126, § 144 ; as to paying money into court under the highway and turnpike acts.]

By the same statute, § 4, it is enacted, "That if the justice shall neglect to tender any amends, or shall have tendered insufficient amends, before the action is brought, it shall be lawful for him, with leave of the court, at any time before issue joined, to pay into court such money as he shall see fit ; whereupon such proceedings, orders, and judgments shall be had, made, and given, as in other actions wherein the defendant is allowed to pay money into court."

It is not necessary that the party, who pleads a tender upon this statute, should bring the money into court : but as the other party, who has once refused to accept the amends which has been tendered, would, for want of this, have no satisfaction for the injury received, the Court of King's Bench have taken the following method of preventing this hardship :—

A justice of the peace, upon receiving notice that an action would be commenced against him, had tendered ten guineas. This was not accepted ; and the injured party, without having made any demand of the money after the refusal to accept thereof, brought an action. The plaintiff being afterwards desirous of accepting the money which had been tendered, the Court of King's Bench made a rule for the defendant to show cause why, upon the plaintiff's discontinuing the action, and paying the defendant his costs subsequent to the tender, the defendant should not pay the ten guineas to the plaintiff. And by Lord Mansfield, Chief Justice—It must have been the intention of the legislature that amends to the party injured should be made as well as tendered. Cause was afterwards shown against the rule ; but it was made absolute.

MS. Rep. *Lawrence v. Cox*, Hil. 33 G. 2, in K. B.

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||In an action against a magistrate, the defendant, after issue joined, may move to withdraw the general issue, pay money into court and plead *de novo*.

Devaynes v. Boys, 2 Marsh. 356.||

7. In an Action of Replevin.

It is, in the general, true, that money cannot be brought into court upon the common rule in an action of replevin.

But if the defendant, in an action of replevin, avow for rent in arrear, the plaintiff may bring money into court upon the common rule.

Salk. 597; 7 Mod. 141; ||1 H. Black. 24.||

In an action of replevin, the defendant avowed the taking of the cattle damage-feasant. The plaintiff in his replication disclaimed title, and pleaded, that his cattle entered into the defendant's ground against his will, and did damage; and that, after impounding them, but before the action was brought, he tendered sufficient amends. Upon demurrer, judgment was given for the defendant. And by the court—The statute of the 21 Jac. 1, extends only to actions of trespass *quare clausum fregit*, and not to actions of replevin, which remain as they were at the common law. Consequently, the tender in this case was not good, because it was not made before the cattle were impounded.

Lutw. 1594, Allen v. Bayley; Freem. 339, 527; 5 Rep. 76.

Upon a motion for leave to bring money into court upon the common rule in an action of replevin, it appeared that, after the impounding of the cattle, which had been distrained damage-feasant, but before the action was brought, more money had been tendered by the plaintiff than the damage, by the admission of the defendant, did amount to; and the question was, Whether this case be within the 21 Jac. 1, c. 16? It was holden that it is not. And by the court—As the leave to bring money into court is by that statute only given in an action of trespass *quare clausum fregit*, it cannot be extended to any other action.

MS. Rep. Newson v. Waters, Hil. 14 G. 3, in C. B.

After the right of distraining cattle as damage-feasant has been tried in an action of replevin, the plaintiff, notwithstanding there be judgment for the defendant, may tender the damages; and, if the cattle are not thereupon delivered, he may maintain an action of detinue for them.

8 Rep. 147; ||Gilb. Dist. 61; 1 Camp. R. 289 n.||

8. In an Action of Trespass.

A tender cannot be made, at the common law, in satisfaction of a trespass.

Bro. Tresp. pl. 214.

By the 21 Jac. 1, c. 16, § 5, it is enacted, "That in all actions of trespass *quare clausum fregit*, wherein the defendant or defendants shall disclaim title to the land, in which the trespass is supposed to be done, and the trespass be by negligence or involuntary, the defendant or defendants shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender of sufficient amends before the action brought, whereupon, or upon some of them, the plaintiff or plaintiffs shall be enforced to join issue."

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In an action of trespass for breaking the plaintiff's close, and mowing his baulk, the defendant, after disclaiming title, pleaded, that he had a baulk adjoining to the plaintiff's; and that, in mowing his own baulk, he had, involuntarily and by mistake, mowed some of the grass growing upon the plaintiff's baulk, intending only to mow the grass growing upon his own baulk; and that before the issuing of the writ, he had tendered to the plaintiff two shillings in satisfaction; and that this was a sufficient amends. Upon a demurrer to this plea, judgment was for the plaintiff. And by the court—The act in this case appears to have been voluntary, and the intention of the defendant, which could not be known, was not traversable.

3 Lev. 37, *Basely v. Clarkson*.

In an action of trespass for taking goods, the defendant pleaded a tender. Upon a demurrer it was holden, that this case is not within the statute of the 21 Jac. 1, c. 16.

Stra. 549, *Bailee v. Vivash*.

By the 11 Geo. 2, c. 19, § 20, a tender may be made, before an action of trespass is brought for any unlawful act done by a person who has distrained for rent justly due.

By the 17 Geo. 2, c. 38, § 10, a tender may be made, before an action of trespass is brought, for any irregularity in distraining for money justly due for the relief of the poor.

[Under certain circumstances the court will, in an action of trespass, stay the proceedings upon the defendant's undertaking to bring the goods for which the action is brought into court, or to pay the full value for them, with the costs of the action.

Pickering v. Truste, 7 Term R. 53;] ||3 Anst. R. 896.||

9. *In an Action of Trover.*

In an action of trover for money, the money may be brought into court upon the common rule.

Stra. 142, *Anon.*

But if an action of trover be brought for goods, the court will not allow the value of the goods in money to be brought into court upon the common rule: for if this were suffered to be done, it would be in the power of the defendant to set a value upon the goods of the plaintiff.

12 Mod. 397.

Nor can the goods themselves, for which an action of trover has been commenced, be brought into court upon the common rule.

Stra. 134, *Anon.*

The court would not give leave to bring a laced head, for which an action of trover had been commenced, into court upon the common rule.

Stra. 822, *Bowington v. Parry*.

In an action of trover for pictures, the court refused to let them be brought into court upon the common rule. And by the court—This action is not to recover the pictures, but to recover damages to the value thereof; and the pictures may not now be in so good a condition as they were at the time of the conversion.

Stra. 1191, *Olivant v. Perineau*.

Although the goods, for the conversion of which an action of trover is brought, cannot be brought into court upon the common rule, the defend-

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ant, if the action be in the Court of Common Pleas, may in some cases have a rule, that upon bringing the goods into court the proceedings shall be stayed.

A rule was granted by the Court of Common Pleas for the plaintiff to show cause, why, upon bringing into court four new-wrought dimity bed curtains, and other goods specified in the declaration, the proceedings should not be stayed; but it appearing, upon showing cause, that the curtains had been cut, altered, and scoured, and thereby lessened in their value, the rule was discharged. And by the court—The making of a rule of this sort absolute is discretionary; and in this case it is not reasonable to oblige the plaintiff to take his goods again.

Royden v. Batty, Barnes, 284.

If the goods, for the conversion of which an action of trover is brought, are heavy or bulky, the Court of Common Pleas will not make a rule for bringing them into court; but will make a rule upon the plaintiff, to show cause why he should not consent to accept the goods.

Cook v. Holgate, Barnes, 281.

It is not the practice of the Court of King's Bench to make a rule, that upon bringing into court the goods, for the conversion of which an action of trover is brought, the proceedings shall be stayed.

This court did indeed, in one case, a few years ago, make a rule for the plaintiff to show cause why the proceedings should not, upon bringing the thing charged to have been converted into court, be stayed.

The book called *Memoirs of a Woman of Pleasure* having been lent by a bookseller for the perusal of some young ladies at a boarding-school, the mistress of the school took it from them, and sent it to the bookseller, with a request that it might not be lent to her scholars again. The book being afterwards found in the possession of one of the young ladies, the mistress took it from her and kept it. An action of trover being thereupon brought, the Court of King's Bench made a rule for the plaintiff, to show cause why, upon bringing the book into court, the proceedings should not be stayed.

Sayer, 80, Catling v. Bowling.

But in another case, in the same court, wherein a motion was made upon the authority of the last case, that the proceedings in an action of trover might be stayed, upon bringing into court a gold watch and a diamond ring, for the conversion of which it had been commenced, no rule was made. And by Wright, J., (Lee, Chief Justice, being absent)—It has been said, that in the case of Catling v. Bowling, in this court, a rule was made to show cause why, upon bringing a book into court, the proceeding in an action of trover should not be stayed; but the rule to show cause in that case, which was made upon the particular circumstances of the case, was contrary to the course of the court, and we never heard any more of that rule.

Sayer, 120, Harding v. Wilkin.

[However, notwithstanding the disposition supposed to be discovered by the court in the last case, the granting or refusing of motions of this kind is entirely in the discretion of the court, governed by the circumstances of the case immediately before them. Where trover is brought for a specific chattel of an ascertained quantity and quality, and where the case is unattended with any circumstances that can enhance the damages above the

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real value, but that the real and ascertained value must be the sole measure of the damages, there the specific thing demanded may be brought into court. And this is the more reasonable, as action of trover comes in the place of the old action of detinue. But where there is an uncertainty, either as to the quantity or quality of the thing demanded, or there is any tort accompanying it, that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value, there it shall not be brought in.

3 Burr. 1364.] ¶Vide *Brunsdon v. Austin*, Tidd's Prac. 544, (7th ed.)¶ {1 Johns. Rep. 65, *Shotwell v. Wendover*.}

¶Where a separate commission had been issued against A, and a joint commission against A and B, and the assignees under the first commission recovered a verdict in trover against C, the Court of King's Bench allowed the amount of the verdict to be brought into court to abide the event of a petition to the Chancellor to supersede the first commission.

1 Barn. & C. 257; 2 Dow. & Ry. 409, S. C.¶

β(Q) Of Tender of Amends.

In New York, when an action at law is commenced for a casual or involuntary trespass, the defendant, before trial, may tender amends.

Clark v. Hallock, 16 Wend. 607.¶

TENURE.

UNDER the word *tenure* is included every holding of an estate.

¶See Crui. Dig. ch. 1, 2, (3d ed.)¶ βThe following is copied from Bouv. L. D. *Tenure*. "The idea of tenure pervades, to a considerable degree, the law of real property in the several states; the title to land is essentially allodial, and every tenant in fee-simple has an absolute and perfect title, yet in technical language, his estate is called an estate in fee-simple, and the tenure free and common socage. 3 Kent, Com. 289, 290. In the states formed out of the North Western Territory, it seems that the doctrine of tenures is not in force, and that real estate is owned by an absolute and allodial title. This is owing to the wise provisions on this subject contained in the celebrated Ordinance of 1787, Am. Jur. No. 21, p. 94, 95. In New York, 1 Rev. St. 718; Pennsylvania, 5 Rawle, R. 112; Connecticut, 1 Rev. L. 348; and Michigan, Mich. L. 393, feudal tenures have been abolished, and lands are held by allodial titles. South Carolina has adopted the statute, 12 C. 2, c. 24, which established in England the tenure of free and common socage, 1 Brev. Dig. 136."¶

But the signification of this word, which is very extensive, is frequently restrained by coupling another word with it.

This is sometimes done by a word which denotes the duration of the estates holden: as if a man hold to himself and his heirs, it is called tenure in fee-simple.

At other times the word *tenure* is coupled with a word pointing out the instrument by which the estate is holden: as if the holding be by copy of court-roll, it is called tenure by copy of court-roll.

At other times the word *tenure* is coupled with a word which shows the

(A) Of Tenure by Service, in the general.

service by which the estate is holden : as if a man hold by knight's service, it is called tenure by knight's service.

That kind of tenure which takes its denomination from the duration of the estate holden, has been treated of under the title "**ESTATE IN FEE-SIMPLE**," and under other proper titles.

Tenure by copy of court-roll has been treated of under the title "**COPY-HOLD**."

It is a first principle of the law of tenures, that the state is the original source of title to land, and that the state possesses a sovereign right to grant land to whom it pleases, with or without consideration.

Jackson ex dem. Houseman v. Hart, 12 Johns. 77.*g*

At present the design is to treat of Tenure by Service.

This shall be done under the following heads :—

- (A) Of Tenure by Service, in the general.
- (B) By what Service an estate may be holden.
- (C) How a Service, by which an Estate is holden, may be extinguished.
- (D) Of whom an Estate may be holden, and in what Cases an Alteration may be made in the service by which it is holden.
- (E) Of Tenure *in Capite*.
- (F) Of Tenure in Frank-Almoign.
- (G) Of Tenure by Divine Service.
- (H) Of Tenure by Knight's Service.
- (I) Of Tenure by Escuage.
- (K) Of Tenure by Grand Serjeantry.
- (L) Of Tenure by Petit Serjeantry.
- (M) Of Tenure by Castle Guard.
- (N) Of Tenure by Cornage.
- (O) Of Tenure in Burgage.
- (P) Of Tenure in Villainage.
- (Q) Of Tenure in Socage.

(A) Of Tenure by Service, in the general.

EVERY corporeal estate lies in tenure by service ; nay every such estate, which is in the possession of a subject, must actually be in tenure by service : for by the law of England no estate can be allodial in the proper sense of this word ; but must be holden of some person.

1 Inst. 1, 9, 23, 47, 93, 98, 144 ; 2 Inst. 501.

Tenants in fee-simple are indeed frequently called, in *Doomsday book*, *allodarii* : but this, which is an inaccurate expression, only means, that such tenants have as large an estate as subjects can have.

1 Inst. 1.

It is, in the general, true, than an incorporeal estate holden of a subject does not lie in tenure ; for tenure cannot be without some service ; and to every service, except that which is due by tenure in frank-almoign, distress is incident : but, as there is not in an incorporeal estate any thing upon which the lord to whom the service is due can enter and distrain, in case it be not performed, it follows, that an incorporeal estate does **not** lie in tenure.

1 Inst. 47, 98, 142, 144 ; Bro. Ten. pl. 34, pl. 75.

(B) By what Service an Estate may be holden.

A fair does not lie in tenure ; because the grantor has no remedy by distress, for a service reserved in the grant of the fair.

5 Rep. 3, Jewel's case.

An advowson appendant to a manor does not lie in tenure : for as such advowson is appendant to the whole manor, the grantor cannot enter and make distress upon any one part of the manor for the service reserved.

Bro. *Ten.* pl. 34 ; 1 Inst. 142, 144.

But an incorporeal estate holden immediately of the crown does lie in tenure ; for the king has, by his prerogative, a power of distraining in any part of his tenant's land, for the services reserved in the grant of the incorporeal estate.

Bro. *Ten.* pl. 18, pl. 34 ; 1 Inst. 47.

And in some cases an incorporeal estate does, although it be holden of a subject, lie in tenure.

The vesture or herbage of land lies in tenure ; for a distress may be upon the land, for the service reserved in the grant of the vesture or herbage.

1 Inst. 47.

It seems to be the better opinion, that an advowson in gross lies in tenure ; because the grantor may distrain upon the glebe, if any beast of the patron be there, for the service reserved in the grant of the advowson.

Bro. *Ten.* pl. 4 ; 1 Inst. 144.

A reversion and a remainder are both incorporeal estates ; yet both lie in tenure : for although the grantor has no remedy for the service reserved, during the continuance of the particular estate, he may, as soon as this is determined, distrain for the service, and, if it be a pecuniary one, for the arrear thereof.

1 Rep. 162, Capel's case ; 1 Inst. 47, 144 ; Bro. *Distr.* pl. 47 ; Perk. s. 627.

(B) By what Service an Estate may be holden.

If a thing which lay in prender, and which would have been profitable to the feoffor, had at the common law been reserved in a feoffment, it would have been a good service.

1 Inst. 142 ; Bro. *Ten.* pl. 109.

And although no profit from the thing reserved would have accrued directly to the feoffor ; yet if from the reservation benefit would have arisen to the public, the thing reserved would have been a good service ; for whatever is beneficial to the public is, in some degree, profitable to every person.

Bro. *Ten.* pl. 50, pl. 109.

But, if the reservation in a feoffment had been of a thing beneficial only to a stranger, this would not have been a good service : because no profit would have accrued therefrom to the feoffor.

Bro. *Ten.* pl. 109.

The reservation of a thing which lay in prender, would not, at the common law, have been a good service.

If one man had enfeoffed another of land, reserving to himself common for four beasts in the land, this would not have been a good service ; because the feoffor could not have had the thing reserved, but by his own act ; and that which a man does for himself cannot with propriety be called a service.

7 Inst. 142 ; Perk. s. 702.

(C) How a Service, by which an Estate is holden, may be extinguished.

No right to a service could, even at the common law, have been acquired after an estate had been granted; for nothing could be due as a service but by reservation; and the person who had once parted with the whole of an estate could not afterwards reserve to himself any thing out of it.

If a man had holden an acre of land of J S by suit of court at his manor of A, and J S, who was also seised of the manor of B, had agreed with the tenant that, instead of doing suit of court at his manor of A, he should do it at his manor of B, J S would not have thereby acquired a right to suit of court at his manor of B; for this would have been an indirect way of reserving a new service as to his manor of B, which, so long as the estate formerly granted continued, the lord had no power to do.

Fitz. N. B. 211; Bro. *Ten.* pl. 65; 2 Inst. 501.

If land had been holden by a rent of twenty shillings, and the lord had agreed with the tenant to accept a hawk instead of the rent, the lord could never have demanded the hawk as a service, because it was not reserved in the grant of the land.

Bro. *Ten.* pl. 49; 1 Inst. 305, 306.

Since the statute of *quia emptores terrarum*, 18 E. 1, st. 1, c. 1, the ancient services must be reserved in every conveyance by which a fee passes, and only these can be reserved; for by this statute, after reciting, that the purchasers of lands and tenements, of the fees of great men and other lords, have heretofore entered into their fees to the prejudice of the lords, to whom the freehold tenants of such great men and other great lords have sold their lands and tenements, to be holden in fee of their feoffors and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands belonging to their fees; it is enacted, "That from henceforth it shall be lawful to every freeman, to sell, at his own pleasure, his lands or tenements, or part of them, so that the feoffee shall hold the same lands or tenements, or part of them, of the chief lord of the fee, by such services and customs as his feoffor held them before."

But by the 1 & 2 Ph. & M. c. 8, § 54, this statute, so far as it prevented the reserving such new services, as could be reserved in the creation of tenure in frank-almoign, or tenure by divine service, is repealed.

As the statute of *quia emptores terrarum* was made for the advantage of chief lords, the king may dispense with it, and license his tenant to reserve any new service. No other lord can do this, by reason of the king's interest as lord paramount; but the king and the mesne lord or lords may together dispense with this statute, and grant such a license to the tenant paravail.

Fitz. N. B. 211; Bro. *Ten.* pl. 65; 2 Inst. 501.

(C) How a Service, by which an Estate is holden, may be extinguished.

EVERY lord may extinguish part or the whole of a service by which land is holden, either by a release in fact, or a release in law.

1 Inst. 305, 306; Bro. *Ten.* pl. 71; Perk. s. 71; §14 East, R. 271.]

There is a material difference, as to the releasing of a service, betwixt a release in fact and a release in law.

If two acres of land be holden by one service, and the lord, by deed re-

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lease all his right to the service as to one acre, this is an extinguishment of the service as to both acres.

Perk. s. 71.

But if two acres of land be holden by one service, and one of them be purchased by the lord, this, although it be a release in law of the service as to that acre, does not extinguish the whole service; but the service, in case it be rent, or any thing which is severable, shall be apportioned.

Perk. s. 71.

If, however, the service by which two acres of land are holden be not severable, as, if it be a horse or suit of court, the whole is as completely extinguished, where one acre is purchased by the lord, as if the lord had by a release in fact discharged both acres of the service.

Bro. *Suit.* pl. 1; Bro. *Ten.* pl. 104; Perk. s. 71.

If one of two acres, which are holden by a service that is not severable, come to the lord by descent, no part of the service, because this acre does not come to him by his own act but by act of law, is extinguished; but the other acre is still liable to the whole service.

Bro. *Ten.* pl. 104; Perk. s. 71.

If two acres be holden by one service, and the lord disseise the tenant of one acre, the whole service is suspended; for although one part of a service, which is severable, may be extinguished by a release in law, and the other part may remain, a service can never be suspended as to part, and remain as to other part of the same tenancy.

Perk. s. 71.

At the common law, if the fee of an estate came to the crown by gift, purchase, or forfeiture, all the services by which it was holden were extinguished, and it might afterwards be granted to be holden by any service.

2 Rep. 52; Bro. *Ten.* pl. 9; 6 Rep. 5; 2 Roll. Abr. 514.

But by the 7 E. 4, c. 5, it is enacted, that every estate holden of a common person, which shall come to the hands of the king by reason of an attainder of high treason, and be afterwards granted by the king to any person, shall, from the time of the grant, be holden by the same services as if no attainder had been.

It is, in the general, true, that if a lord become seised in fee of an estate holden of himself, the service by which it was holden is extinguished by the unity of possession.

Bro. *Avowr.* pl. 46; Perk. s. 89.

But, if a tenant enfeoff his lord of the tenancy upon condition, the service is only suspended: for, if the condition be broken, and the tenant enter, it shall be revived: but if, before the entry of the tenant, the lord enfeoff a stranger, the service is extinguished; and, although the first feoffor afterwards enter for breach of the condition, it shall never be revived; because the tenancy was, by the enfeoffment of the stranger, discharged of the service.

Perk. s. 89.

(D) Of whom an Estate may be holden, and in what Case an Alteration may be made in the Service by which it is holden.

EVERY estate which lies in tenure is by the law of England holden im-

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mediately or mediately of the king, who is lord paramount to all other lords.

1 Inst. 1, 9, 23, 47, 93; 2 Inst. 501. [Though this was a consequence of the feudal system, yet it is said, that allodial property continued among us till the time of Henry the Second; and is, even yet, to be met with in some of the Isles of Scotland. See Watkins's edition of Gilbert's Tenures, note vi., and the following books there referred to, viz., Mad. Baronia Anglica, b. 1, c. 2, p. 30; Stuart's View, b. 2, c. 2, p. 106; Dissert. 3, § 4, p. 178, n. (3); View, b. 1, c. 2, § 1, n. (4), p. 208, 209; Kaimes's Ess. Brit. Antiq., Ess. 1, p. 19; Hargr. n. (1); Co. Lit. 64, a. And see, as to its continuance on the Continent, 1 Roberts. Cha. V., § 1, p. 267, &c., 271, n. (H).]

Every other lord, of whom an estate is holden, is, from his situation between the king and the tenant paravail, called mesne lord; yet, as one manor may be holden of another manor, one mesne lord may be lord paramount to another mesne lord.

Fitz. N. B. 135.

If lord, mesne, and tenant are, and the mesne release to the tenant, the tenant shall hold of the lord by the same service as the mesne held; for, although the service due from the tenant to the mesne be extinguished by the release, the tenant has, by his own act, put himself into the place of the mesne.

2 Inst. 502; Bro. Ten. pl. 97; 2 Roll. Abr. 512.

But, where lord, mesne, and tenant are, and the mesnalty is determined by the act of God, as by escheat upon the death of the mesne without heir, the tenant shall hold of the lord by the same service as he before held of the mesne; for, although the seigniorship does, in this case, merge into the mesnalty, which is more advantageous for the lord, because it brings him nearer to the tenancy, the tenant shall not be thereby prejudiced.

Bro. Ten. pl. 37, pl. 97; 2 Roll. Abr. 512.

So, if there be lord, mesne, and tenant, and the mesnalty be determined by act of law, as by escheat for felony, the tenant shall hold of the lord by the same service as he before held of the mesne.

Bro. Ten. pl. 91; 2 Roll. Abr. 513.

If lord, two mesnes, and tenants are, and the second mesnalty come by act of God, or of law, to the first mesne, the first mesnalty, it being more advantageous for the first mesne, merges into the second; yet the second mesne shall hold of the lord by the same service as the first did.

2 Inst. 502; 2 Roll. Abr. 513.

At the common law, a man might have aliened his whole tenancy in fee, to be holden of the lord; but he could not have aliened a part thereof in fee, to be holden of the lord; for, as by this means there would have been a division of the service, the lord could not have distrained in the part so aliened, or the whole thereof, as he might have done before the alienation.

2 Inst. 65.

But a man might, at the common law, have aliened a part of his tenancy in fee, to be holden of himself; for, as the service would still have remained entire, the lord could have distrained in the remaining part for the whole thereof.

2 Inst. 65.

In consequence of this liberty, many tenants did alien so much of their

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tenancies, that there was not enough left to answer to the respective lords for the services due to them.

For the sake of putting a stop to this practice, which was prejudicial to the lord of whom the tenancy was holden, it was provided by *Magna Charta*, that no tenant should alien so much of his tenancy in fee, as not to leave sufficient to answer to the lord for the whole service.

Magn. Chart. c. 32.

As frequent questions arose, after the making of this statute, whether, after an alienation of part, a sufficiency of the tenancy was left to answer to the lord for the whole service, it was, by the statute of *quia emptores terrarum*, enacted, that if any tenant shall alien a part of his land or tenement in fee, the alienee shall hold the part so aliened immediately of the chief lord of the fee, and shall be forthwith charged with the service, for so much as pertaineth, or ought to pertain, to the said chief lord for such part, in proportion to the quantity of the whole land or tenement.

18 E. st. 1, c. 2; 2 Inst. 66.

||Since this statute, if a lord convey a customary estate to the tenant, he cannot reserve to himself the ancient services; for, by reason of the statute, the tenant must thenceforth hold of the superior lord, and not of the grantor.

Bradshaw v. Lawson, 4 Term R. 443; Doe d. Reay v. Huntington, 4 East, 271.||

As this statute, although made after the statute *de donis*, is confined to lands and tenements of which the fee is granted, if a gift in tail be made, the donee shall hold of the donor, and not of the chief lord; for, so long as the reversion continues in the donor, the donee must hold of him; and the law will not suffer the donee to hold both of the donor, and of the chief lord.

Bro. Ten. pl. 21, pl. 37, 96; 1 Inst. 505; 2 Roll. Abr. 501.

But if a baron seised in fee of an inheritance in the right of his feme, make a gift in tail, the donee shall not hold of the baron but of the lord of whom the feme held; because the baron had nothing, but in right of the feme.

1 Inst. 23; 2 Inst. 502.

Notwithstanding the statute of *quia emptores terrarum* speaks only of estates in fee-simple, yet if a gift is made to A for life, or in tail, with remainder to B in fee, the tenant for life, or in tail, shall hold of the chief lord; for as the whole fee is departed with by the donor, neither of the donees can hold of the donor, and, consequently, both must hold of the chief lord.

2 Inst. 505.

[If the tenant in tail has the reversion in himself, there, although the two estates continue distinct, yet, as he cannot hold of himself, the tenure of the estate-tail is suspended; and he is tenant to the lord in fee.

Watkins's edition of Gilb. Tenures, Note XLII.; 2 Co. 92 b; Bro. Ten. 84, 107; F. N. B. 143 a, 144 a; Dy. 235, pl. 22; Vin. Abr. tit. Tenure, (H. a.) pl. 12.]

As a man seised of two manors might, before the statute of *quia emptores terrarum*, by a feoffment in fee, so he may now, by a gift in tail, convey a parcel of one manor and a parcel of the other, to be holden of himself as one tenancy of the same service; and the service shall, in such case, be regardant to both manors.

2 Roll. 499.

(E) Of Tenure *in Capite*.

EVERY estate is holden of the person of him of whom the estate is holden, or of some honour or manor of which that person is seised.

1 Inst. 108; Bro. *Ten.* pl. 6, pl. 47.

Every holding of the person is, to speak with propriety, a tenure *in capite*: but only tenure of the king's person has been by way of eminence so called; for wherever the holding was of the person of a subject, it was called tenure in gross, to distinguish it from tenure of a manor.

1 Inst. 108; Bro. *Ten.* pl. 47, pl. 60, pl. 65.

Tenure *in capite* seems not to have been well understood, either by Mr. Selden or Sir Henry Spelman; for both of them, as appears plainly from some passages in their works, were of opinion that every tenure *in capite* was a tenure by barony.

Mad. Hist. Exch. 432, 433.

It is very true, that about the time of Henry the Second most of the king's tenants *in capite* were real or reputed barons; but this was not owing to their being tenants *in capite*, but to the largeness of the seigniories which they held of the king.

Mad. Hist. Exch. 432, 433.

It is also true, that in ancient times every one who held by barony was a tenant *in capite*; but the converse of this proposition, that every tenant *in capite* was a tenant by barony, is not true; and upon examination it will be found, that by tenure *in capite* nothing more was meant than a holding of the person of the king; and that, so far from its being confined to a tenure by barony, a man might have holden of the person of the king by knight's service, socage, or any other tenure, as well as by barony.

1 Inst. 108; 2 Inst. 7; Bro. *Ten.* pl. 46, pl. 94; 2 Roll. Abr. 503.

At the common law tenure *in capite* was, in the general, so inseparable from a holding of the person of the king, that if land or tenement was granted by the king to hold of his person, the grantee, although no service was reserved, would have been tenant *in capite*; because this tenure was most advantageous for the king.

9 Rep. 123, Lowe's case; Bro. *Ten.* pl. 3.

If the king had purchased land or tenement of a subject, and had afterwards granted it to be holden of his person, without reserving any service, this grant would have created a tenure *in capite*.

Bro. *Ten.* pl. 9; 2 Roll. Abr. 504, 505.

If an honour had been forfeited to the king, and a manor holden thereof had come thereby to him, and the king, after being seised of the manor, had enfeoffed any person of it, to be holden of his person, the feoffee would, although no service was reserved, have been tenant *in capite*.

2 Inst. 64; Bro. *Ten.* pl. 9; 2 Roll. Abr. 505.

But, in some cases, a grant to hold of the person of the king did not, even at the common law, create a tenure *in capite*.

If an honour had been seised into the king's hands, and a manor holden thereof had escheated to him, as of a common escheat, and the king, after being seised of the manor, had granted it to be holden of his person, the grantee would have held it by the same service as the manor was before holden; because this was not a forfeiture to the king as king, but an escheat to him as lord.

2 Inst. 64; Bro. *Ten.* pl. 9; 2 Roll. Abr. 502.

(E) Of Tenure *in Capite*.

So, if land or tenement, holden of a mesne lord, had come to the king by forfeiture for high treason, and the king, after being seised thereof, had granted it to J S, *tenendum de nobis, hæredibus et successoribus nostris, et aliis capitalibus dominis feodi illius, per servitia inde debita et de jure consueta*, J S would not have been tenant *in capite*; for by this grant the tenure of the mesne lord, as well as that of the king, as supreme lord, would have been revived.

6 Rep. 6, Molyn's case; Bro. *Ten.* pl. 3; 2 Roll. Abr. 502.

An end was put to many distinctions concerning tenure *in capite*, which prevailed at the common law, by a statute made in 1 Edw. 6, it being thereby enacted, "That such honours, castles, manors, lands, tenements, or other hereditaments, which now are, or hereafter shall be holden of the king, his heirs or successors, [or by any of his subjects by knight's service, socage, or otherwise, as of any of his or their dukedoms, earldoms, baronies, castles, manors, lands, tenements, fees, or seigniories,] which did come to the king or his noble ancestors, or hereafter shall come to the king, his heirs, or successors, by any attainder, conviction, outlawry, or surrender, shall not from henceforth be adjudged, deemed, or construed to be holden *in capite*; any ambiguity, doubt, or question heretofore moved to the contrary notwithstanding."

1 E. 6, c. 4. [Vide Rast. *Statutes*, 4422 b.]

It is said in some books, that, at the common law, every holding of the king, as of an honour, was a tenure *in capite*.

1 Inst. 77; F. N. B. 256; Bro. *Liv.* pl. 58.

But it seems to be the better opinion, that no grant, to hold of the king as of an honour, did, even at the common law, create a tenure *in capite*, and that Magna Charta is not introductive of any new law as to this matter, but declaratory of the common law.

1 Inst. 108; 2 Inst. 64; Bro. *Ten.* pl. 61, pl. 100; Magna Ch. c. 30. [But this notion, that a tenure *ut de honore* is not a tenure *in capite* is controverted by Mr. Madox with great cogency of reasoning. Tenure *in capite*, in its genuine sense, signifies a tenure of another *sine medio*, that is, immediately and without the interposition of any mesne or intermediate lord; and, therefore, where an honour or other seigniority came into the hands of the crown by escheat or otherwise, its tenants were as much tenants *in chief* to the king, as those who were so by original grant from the crown. In proof of this Mr. Madox selects, from ancient records, a great variety of instances between the 8th of Richard the First, and the 20th of Henry the Sixth, in which tenures *ut de honore* are expressly styled tenures *in capite*; and as he adds no instances of a later time than Henry the Eighth, and Queen Elizabeth, in which the words *in capite* are omitted, it may be conjectured that the error he complains of originated soon after the time of Henry the Sixth. Mad. Baron. Angl. 181. The design of excluding tenures *ut de honore* from the description of tenures *in capite* was to distinguish those estates which were held of the king by a tenure originally created by the king, from those held of him by a tenure commencing by the subinfeudation of a subject, between which there were many differences in point of incident very essential both to the lord and tenant. Mad. Baron. Angl. 12. But it should have been recollected, that the distinction aimed at was already marked, with equal sufficiency and more correctness, by denominating tenures of the first sort tenures *ut de coronâ*, and those of the second, tenures *ut de honore*. The influence of this mistaken notion of tenure *in capite* is very evident, as well throughout the statute of Car. 2, for taking away the oppressive fruits of knight's service and tenure *in capite*, as in those grants from the crown, which in the *tenendum* are expressed to be *ut de honore et non in capite*. Hargr. Co. Lit. 108, a note (3).

It is indeed true in fact, that divers lands and tenements were heretofore holden of the king *in capite*, as of certain honours, and particularly as of the honour of Lancaster: but this is easily to be accounted for.

Bro. *Ten.* pl. 1.

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(F) Of Tenure in Frank-Almoign.

As some honours, and particularly that of Lancaster, had heretofore *jura regalia* annexed to them, the person seised of such an honour, being a kind of petty king, might very well have created a tenure *in capite*; and if lands or tenements were once holden of such an honour *in capite*, they would, if the honour came afterwards into the hands of the king, be holden of him *in capite*, as of that honour.

2 Roll. Abr. 503.

Every tenure *in capite* must originally have been created by a king, or by a person possessed of *jura regalia*; for no tenure, which was originally created by a subject, could afterwards become a tenure *in capite*.

2 Inst. 501; 2 Roll. Abr. 504; Dav. 59.

If a prince of the blood had granted land or tenement to be holden of his person, this, although he afterwards succeeded to the crown, would not have become a tenure *in capite*.

2 Roll. Abr. 504.

If a tenant had holden of the person of the mesne lord, and the seigniorship of the mesne lord had been forfeited to the king for high treason, the tenure, although the holding would from thenceforth have been of the person of the king, would not have become a tenure *in capite*.

1 Inst. 108; 2 Roll. Abr. 504; Dav. 59.

A tenant *in capite*, besides being liable to the services and fruits of the particular tenure by which he held, was moreover liable, on the account of his tenure *in capite*, to a fine for alienation, and to primer seisin.

But by the 12 Car. 2, c. 24, § 1, tenure *in capite* was changed into tenure in common socage, and all persons, who before held *in capite*, were discharged of a fine for alienation, and of primer seisin.

[See Mad. Baron. Angl. 238, 239, where the learned author observes on the inaccuracy of language in the 12 Car. 2, about tenure *in capite*. The title of the act expresses, that it was made for taking away tenure *in capite*; and the first enacting clause proceeds on the same idea. But had the act been accurately penned, it would simply have discharged such tenure of its oppressive fruits and incidents; which would have assimilated it to *free and common socage*, without the appearance of attempting to annihilate the *indelible* distinction between holding *immediately* of the king, and holding of him through the *medium* of other lords. Hargr. Co. Lit. 108 a, note (5).]

(F) Of Tenure in Frank-Almoign.

THE services, by which estates may be holden, are sometimes spiritual, at other times temporal.

Tenures by spiritual services are two: tenure in frank-almoign, and tenure by divine service.

No person, except an ecclesiastic, can hold by either of these tenures.

Tenure in frank-almoign is where an ecclesiastic holdeth land of a lord, without any service being annexed to the tenure.

1 Inst. 93, 94.

As the divine service, which ought of right to be performed, is never ascertained by the deed creating a tenure in frank-almoign, no distress can be made, although it be not performed. But, if the divine service, which of right ought to be performed, be not performed, the ordinary or visitor may punish the tenant for the default.

1 Inst. 96, 97.

An ecclesiastic, who holds in frank-almoign, is bound of right to make

(G) Of Tenure by Divine Service.

orisons, to say prayers or masses, or to perform other divine service, for the soul of the grantor, and for the souls of such heirs of the grantor as are dead, and for the prosperity and good life of such heirs of the grantor as are living.

1 Inst. 93, 95.

As the manner of celebrating divine service has been altered by divers statutes, it is sufficient if a tenant in frank-almoign perform such divine service as he may now lawfully perform.

Hawk. Abr. Co. Inst. 146.

As no land or tenement can be holden in frank-almoign, except of the original grantor and his heirs, a stop was put to the creation of this tenure by the statute of *quia emptores terrarum*; it being thereby enacted, that the grantee of an estate in fee, in any land or tenement, shall hold the same of the chief lord of the fee by such services as the grantor before held.

1 Inst. 99; 2 Inst. 502; 18 E. 1, st. 1.

But by the 1 & 2 of Ph. & M. c. 8, § 54, a license was given to create a tenure in frank-almoign.

A grant to hold in frank-almoign does so entirely exclude all temporal services, that fealty, which is incident to every other tenure, is not incident to that in frank-almoign:

1 Inst. 93, 95.

But, if a tenant in frank-almoign alien his land or tenement in fee, to be holden of the lord by the same services as he held, the alienee, although he be an ecclesiastic, shall hold it by fealty: for he cannot hold in frank-almoign, because he does not hold of the original grantor or his heirs; and, as every tenant, except tenant in frank-almoign, must hold by some service, the law creates a tenure by fealty; because this tenure, fealty being the least service which can be done, is nearest to the freedom of the former tenure.

1 Inst. 98, 99; 2 Inst. 502.

A tenant in frank-almoign is not only exempted from all temporal services, but the lord of whom he holds is likewise bound to acquit him of every service and fruit of tenure, which any lord paramount may demand from the land or tenement holden by this tenure; and if the lord, of whom the tenant in frank-almoign holds, do not acquit him of every such service and fruit, but suffer a distress to be made for the same, he may have a writ of mesne against the lord, and recover damages.

1 Inst. 99, 100.

By the 12 Car. 2, c. 24, § 7, it is provided, that tenure in frank-almoign shall not be thereby taken away, nor be subject to any greater or other services than it was before subject to.

12 Car. 2, c. 24, § 7. [*Qu.* The necessity of this saving clause in the act, how the provisions of it could have extended to this species of tenure? Hargr. Co. Lit. 100 b, note.]

(G) Of Tenure by Divine Service.

TENURE by divine service is, in many respects, so similar to tenure in frank-almoign, that, instead of repeating what was said under the last head, it will be sufficient to point out the difference betwixt the two tenures.

(H) Of Tenure by Knight's Service.

The divine service to be performed by a tenant by divine service is always ascertained in the deed creating the tenure, as that certain prayers shall be said upon every Friday in the year; which is never done in the deed creating a tenure in frank-almoign.

1 Inst. 96, 97.

The consequence is, that the lord may distrain if the divine service be not performed; for wherever a service due by tenure is certain, a distress may be made if it be not performed.

1 Inst. 96.

Another difference is, that a tenant by divine service is liable to fealty, fealty being incident to every service for the neglect of which a distress may be made.

1 Inst. 97.

It is not provided by the 12 Car. 2, c. 24, as is done in the case of tenure in frank-almoign, that tenure by divine service shall not be taken away; but this tenure is not thereby expressly taken away.

[Such a provision in either case seems to be unnecessary.]

(H) Of Tenure by Knight's Service.

TENURES by temporal services were heretofore very numerous; for, before the statute of *quia emptores terrarum*, a reservation of any service, which was profitable to the grantor, would have created a tenure by that service.

The tenures by temporal services which had acquired distinct names, were tenure by knight's service, tenure by escuage, tenure by grand serjeantry, tenure by petit serjeantry, tenure by castle guard, tenure by cornage, tenure in burgage, tenure in villainage, and tenure in socage.

Some of these tenures are now taken away; others of them are changed into tenure in socage: but, as frequent mention is made of these tenures in the books, it cannot be amiss to give a short account of every one of them.

Tenure by knight's service was the holding of an estate by some corporal service, to be performed for the defence of the realm.

1 Inst. 74.

It will follow from this definition, that divers tenures, as tenure by escuage and some others, were in reality, notwithstanding they have, from the specialty of the services to be performed, acquired other names, tenures by knight's service.

And indeed every corporal service which a tenant was bound to perform in war was, although the service itself was not of a military kind, knight's service.

Sir Richard Rockesley was bound by tenure to be *vantarius regis*, that is, the king's fore-footman, when he went into Gascony to make war, until he had worn out a pair of shoes which cost four-pence. This service, as it was to be performed when the king went into Gascony to make war, was holden to be knight's service.

1 Inst. 69.

Knight's service was called *chivalry*; because the service was, for the most part, to be performed on horseback.

1 Inst. 74, 75.

(H) Of Tenure by Knight's Service.

It was also called *servitium forinsecum* ; because a tenant was liable to this, over and above all other services which were due to his lord.

1 Inst. 69, 74.

It has been also called *servitium regale*, because it was ultimately due only to the king ; for no lord, although his tenant held of him by knight's service, could compel the performance thereof, unless the lord was himself with the king's army in actual service, or had compounded with the king for his own service.

1 Inst. 74, 75.

This service was, in many grants, expressly reserved ; and where this was not done, as it was instituted for the defence of the realm, every intendment was made to increase it as much as possible.

Wherever land or tenement was granted, and there was not in the grant such a reservation as did create a tenure in socage, it was constantly holden that such land or tenement should be holden by knight's service.

9 Rep. 123 ; Bro. *Ten.* pl. 3, pl. 7 ; 1 Inst. 85, 86.

Every tenant liable to this service, who held so much land as amounted to a knight's fee, was, upon being summoned, bound to come on horseback, or to send a sufficient deputy, well arrayed, to any place within the realm which was appointed by the king ; and every tenant liable to this service, who held less than a knight's fee, was bound to contribute, in proportion to the estate by him holden, to the expense of a horseman.

1 Inst. 68, 69, 70, 74, 75 ; 2 Roll. Abr. 511.

The opinions are different as to the quantity of land which did amount to a knight's fee : but the better opinion seems to be, that this did not depend upon the quantity but upon the value of the land ; for that any quantity of the value of twenty pounds a year did amount to a knight's fee.

1 Inst. 69.

Knight's service being instituted for the defence of the realm, an heir was held to be incapable of performing it before he was twenty-one years of age ; and that he might, during his younger years, be taught deeds of chivalry and virtuous and worthy sciences, the lord was, during his minority, to have the custody of the heir.

1 Inst. 75.

Tenants by knight's services were, in ancient times, entitled to divers privileges and exemptions, for the sake of encouraging them to be the better prepared with horses and arms for the defence of the king and realm : but these were lost many years before tenure by knight's service was taken away.

1 Inst. 75.

Besides the military service due from a tenant by knight's service, he was also liable to the services of homage and fealty.

The fruits to which this tenure was liable were, ward, marriage, aid for making the lord's eldest son a knight, aid for the marriage of the lord's eldest daughter, and relief.

By the 12 Car. 2, c. 24, § 1, tenure by knight's service is changed into tenure in socage.

By the same statute, § 2, the socage tenure, into which tenure by knight's service is changed, is discharged of homage, ward, marriage, aid for making the lord's eldest son a knight, and aid for the marriage of the lord's eldest daughter.

(I) Of Tenure by Escuage.

And by the same statute, § 5, it is enacted, that the new tenure in socage should be only liable to such relief as tenure in socage was before liable to.

(I) Of Tenure by Escuage.

If a man were, by tenure, bound to perform knight's service in a voyage royal, this was tenure by escuage.^(a)

¶(a) Madox, Hist. of Exch. c. 16, conceives that escuage may have been levied by Henry I. The earliest mention of it, however, in a record, is under Henry II., in 1159. Lyttleton's Hist. H. 2, vol. iv. p. 13. An important provision in the *Magna Charta* of John secures the assessment of escuage in parliament. This is not renewed in the Charter of Henry III.; but the practice during his reign appears to have been conformable to its spirit. See Hallam's Midd. Ages, vol. i. p. 310.¶

Every tenant by escuage was also tenant by knight's service: but many tenants by knight's service were not liable to escuage; for escuage was never due but by special reservation.

1 Inst. 69, 82, 83, 106, 108.

As every going of the king into Scotland, or into any other place out of England, was called a voyage royal, there were, of course, other voyages royal as well as for war: but escuage was only due in a voyage royal for war.

1 Inst. 69. [Qu. Whether escuage, where knight's service was reserved *generally*, could be claimed in all *foreign* expeditions, whether it was confined to expeditions into *particular* countries? Hargr. Co. Lit. 74 a, note (1).]

And this service was only due in such voyage royal for war as was undertaken for the suppression of a rebellion, or for the defence of the realm; for if the design of the voyage royal were to make a new conquest, escuage was not due.

1 Inst. 68; 2 Roll. Abr. 508.

Whenever the king, either in person or by his lieutenant, undertook a voyage royal in which escuage was due, every tenant of a whole knight's fee, who was liable to this service, was bound to be with the king's army, or to send some able man to be there in his room, well arrayed, for the space of forty days, or to compound with the king for such service; and if he held more or less than a whole knight's fee, he was bound to be with the king's army, in person, or by deputy, for a longer or shorter space of time than forty days, in proportion to what he held, or to compound for such service.

1 Inst. 69, 72; Fitz. N. B. 83; 2 Roll. Abr. 510.

The time of the service in a voyage royal did not commence until the king had entered into the foreign nation; for it could not till then be performed.

1 Inst. 71.

But every tenant by escuage was not, unless he held immediately of the king, obliged to serve in every voyage royal where escuage was due.

1 Inst. 69.

If two mesne lords and tenant paravail all held by this service, neither the second mesne, nor the tenant paravail, was bound to perform it, unless the first mesne did perform it to the king; but, if the first mesne did perform it to the king, the second was bound by his tenure of the first to perform it to him: and in like manner, if the second did perform it to the first mesne, the tenant paravail was also bound to perform it to the second mesne.

1 Inst. 69, 70; Fitz. N. B. 84; 2 Roll. Abr. 510. ¶According to Mr. Madox's ac-

(K) Of Tenure by Grand Serjeantry.

count, it seems that the lord, though he did not go in person or send a deputy, was entitled to escuage from his tenants if he was charged with escuage to the king. Mad. Hist. Exch. fol. edit. 469; Harg. Co. Lit. 72 b, n. 4.||

Although, however, neither the second mesne nor the tenant paravail was bound to serve in a voyage royal, unless the first mesne did serve in the voyage; yet, if either of these did serve in the voyage, for so long time as the first mesne ought to have served, this would have excused the default of the first mesne; for only one escuage was due to the king for the tenancy.

1 Inst. 69, 70; Fitz. N. B. 84.

As soon as the king's army was returned from a voyage royal, every one of his tenants by escuage, who had not performed the service, nor compounded with the king for it, was liable to pay a sum of money for his default.

1 Inst. 72; Fitzh. N. B. 83; 2 Roll. Abr. 508.

And in like manner every mesne lord who held of a superior lord by escuage, and every tenant paravail who held by escuage, was liable to pay a sum of money to the lord of whom he held, for his default in not performing the service, or compounding for it: but, if such superior lord had himself made default, he was not entitled to receive any thing for the default of the mesne lord.

1 Inst. 72, 73; Fitzh. N. B. 83.

The sum to be paid by tenants by escuage, who had made default, was always ascertained by parliament: for, as it concerned a great number of persons, the king could not ascertain it by his own authority.

1 Inst. 72, 73; Fitzh. N. B. 83.

The manner of ascertaining the sum to be paid in such case, was at the rate of a sum certain for a knight's fee, and of a proportionate sum for a greater or less quantity of land than a knight's fee.

1 Inst. 72; Fitzh. N. B. 83.

By the 12 Car. 2, c. 24, § 2, tenure by escuage underwent the same changes as tenure by knight's service did.

(K) Of Tenure by Grand Serjeantry.

If a man be by tenure bound to perform a military service to the person of the king, as to carry his banner or his lance, ||or to lead his army, or be his marshal, or to carry his sword before him at his coronation, or to be his sewer at his coronation, or his carver, or his butler, or to be one of his chamberlains at the receipt of his exchequer,|| this is tenure by grand serjeantry.

1 Inst. 105, 106, 107.

The service due by this tenure was called grand serjeantry, or the great service; because, on account of the excellency of the person to whom it was to be performed, it was a greater and more worthy service; for if the same service were to have been performed to the person of a mesne lord, it would have been only knight's service.

1 Inst. 105, 106, 107.

Tenure by grand serjeantry was not, however, confined to the holding by a military service to be performed to the person of the king.

1 Inst. 106.

(L) Of Tenure by Petit Serjeantry.

For if a man were by tenure bound to execute the office of marshal, high constable, high steward, or great chamberlain of England, this was tenure by grand serjeantry.

1 Inst. 106.

It was also tenure by grand serjeantry, if a man were by tenure bound to execute an office which concerned the receipt of the king's treasure, or the administration of justice.

1 Inst. 106.

It was also tenure by grand serjeantry, if a man were by tenure bound to perform any service to the person of the king at his coronation, as to carry the sword or cup.

1 Inst. 106.

If the service due by this tenure were of a military kind, it could never be performed by deputy.

1 Inst. 105. [Vide Hargr. Co. Lit. 106 b, n. 5.]

If the service due by this tenure were to be performed in time of peace, and the man who by tenure ought to do the same were not of sufficient dignity for the performance thereof in person, he was allowed to make some person of sufficient dignity his deputy.

1 Inst. 107.

But, if a woman, or an infant, became seised of any land or tenement, to which the performance of a service due by this tenure in the time of peace was annexed, neither of these could make a deputy; but a proper person, both of these being incapable thereof, was appointed by the king to perform it.

1 Inst. 107.

Although every tenant by grand serjeantry was likewise tenant by knight's service; yet every such tenant was exempted from the aid for making the lord's eldest son a knight, and likewise from the aid for the marriage of the lord's eldest daughter, to both which other tenants by knight's service were liable.

1 Inst. 105, 107.

By the 12 Car. 2, c. 24, § 1, tenure by grand serjeantry is changed into tenure in socage.

[Vide Hargr. Co. Lit. 108 a, note (1).]

But by the same statute, § 7, it is provided, that no honorary service, which was before due by this tenure, should be taken away.

(L) Of Tenure by Petit Serjeantry.

If a man be, by tenure, bound to pay yearly to the king a bow, an arrow, or any other instrument of war, this is tenure by petit serjeantry.

1 Inst. 108.

A tenant by petit serjeantry was only liable to fealty, and the payment of the thing due.

1 Inst. 108.

This tenure, notwithstanding its being called by another name, is a species of tenure in socage.

1 Inst. 108. [The tenure of petit serjeantry is not named in the 12 Car. 2, but the statute is not without its operations on this tenure. It being necessarily a tenure *in capite*, though in effect only so by socage, livery and premier seisin were of course in-

(N) Of Tenure by Cornage.

cident to it on a descent; and these are expressly taken away by the statute, from every species of tenure *in capite*, as well socage *in capite*, as knight's service *in capite*. But we apprehend that in other respects petit serjeantry is the same as it was before; that it continues in denomination, and still is a dignified branch of the tenure by socage, from which it only differs in name, on account of its reference to war. Hargr. Co. Lit. 108 b, n. (1).¶

(M) Of Tenure by Castle Guard.

If a man were by tenure bound, upon reasonable notice given to him that an enemy was coming, to defend a tower or any certain part of a castle belonging to his lord, or to pay a certain rent in lieu of such service, this was tenure by castle guard.

1 Inst. 82, 83.

If the tenant had not the alternative of paying a certain rent in lieu of this service, but was obliged to perform it in person, or by deputy, this tenure was a species of tenure by knight's service.

1 Inst. 87.

And it continued to be a species of tenure by knight's service, although a sum of money in gross was in lieu of the service voluntarily paid by the tenant, and received by the lord.

1 Inst. 87. [See Mr. Hargrave's note upon this passage.]

Wherever a certain rent was to be paid to the lord in lieu of the service, this tenure was a species of tenure in socage.

1 Inst. 87.

If a tenant by castle guard were at any time called out to perform knight's service in the king's army, he was, for so long time as he served in the king's army, excused from the service of castle guard.

Magn. Chart. c. 20; 2 Inst. 34.

The service due by this tenure was not discharged, although the castle to which it appertained was entirely demolished; the tenant being, in such case, only excused from the service until the castle was rebuilt.

1 Inst. 83.

But, if lord and tenant by castle guard were, and the lord had granted the seigniorship whilst the castle was demolished, the service due by this tenure would have been discharged; because the grantee had not the castle: nor could it have been revived, if the grantee had built a new castle.

4 Rep. 86; Bro. Ten. pl. 11; 1 Inst. 83.

Wherever this tenure was a species of tenure by knight's service, it is by the 12 Car. 2, c. 24, § 1, changed into tenure in socage.

And by the same statute, § 2, tenants by castle guard, who were also tenants by knight's service, are discharged of such services and fruits of tenure as other tenants by knight's service are discharged of.

(N) Of Tenure by Cornage.

If a man were, by tenure, bound to wind a horn, for the sake of alarming the country, as often as he heard that an enemy was come, or about to come, into England, this was tenure by cornage.

1 Inst. 106.

This tenure, if the tenant held immediately of the king, was a species of tenure by grand serjeantry: but if he held of a common person, it was a species of tenure by knight's service.

1 Inst. 106.

(Q) Of Tenure in Socage.

By the 12 Car. 2, c. 24, § 1, this tenure is changed into tenure in socage.

And by the same statute, § 2, such tenants by cornage as were likewise tenants by grand serjeantry are discharged of such services and fruits of tenure as other tenants by grand serjeantry are discharged of; and such tenants by cornage as were likewise tenants by knight's service are discharged of such services and fruits of tenure as other tenants by knight's service are discharged of.

(O) Of Tenure in Burgage.

If a man hold an estate, which lies in a borough, of the king, or other lord of the borough, by a certain yearly rent, this is tenure in burgage.

1 Inst. 109.

Tenure in burgage was only liable to fealty and the payment of the yearly rent.

1 Inst. 109.

This tenure, notwithstanding its being called by another name, is a species of tenure in socage.

1 Inst. 109. ¶ We do not observe any thing in the statute of Car. 2, c. 24, which in the least varies the tenure by burgage. For further information about *Burgage* and *Boroughs*, see Brady on Bor.; Madd. Firma Burgi; Squire's Anglo-Sax. Gov. 1st edit. tit. *Boroughs*, in Index; and Wright's Tenures, 205; Harg. Co. Lit. 116 a, n. 1.]

(P) Of Tenure in Villainage.

If a man were by tenure bound to perform a base service for his lord, this was tenure in villainage.

Tenure in villainage was of two kinds: tenure in villainage, and tenure in pure villainage.

In the former of these, the service to be performed, although base, was certain, as to carry the dung of the lord, and spread it upon his land.

1 Inst. 116.

In the latter, the service, which depended altogether upon the will of the lord, was so uncertain that the tenant could never tell at night what service he was to perform the next morning.

1 Inst. 116.

Only a villain could be a tenant in pure villainage: but a freeman might be a tenant in villainage.

1 Inst. 116.

(Q) Of Tenure in Socage.

If a man be by tenure bound to pay any certain thing to the lord, this is tenure in socage.

Tenure by socage is so called from *soca*, a soke or plough, because the service reserved, at the first institution of this tenure, was to be performed with a plough.(a)

1 Inst. 86. ¶(a) But Somner, Gavelk. 138, derives the word from *soc*, a Saxon word for liberty or privilege, and *agium* from *agenda*, or things to be done. The latter part of this etymology seems clearly erroneous, the *agium* being, as Blackstone concludes, only a "usual termination." With this amendment, Blackstone prefers Somner's etymology to that of Littleton in the text. Sir Martin Wright prefers the etymology of Littleton. Wright, 211; and see Co. Lit. 86 a, n. (1), and Black. Com. b. 2, p. 80.]

In ancient times, every tenant in socage was bound, by a reservation in

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his grant, to serve a certain number of days in every year, in ploughing and sowing the demesne lands of his lord.

1 Inst. 86.

Afterwards the service was, by agreement between the lord and tenant, changed into a certain payment: but the name of tenure in socage was still retained.

1 Inst. 86.

In still later times every tenure by which a certain thing was to be paid to the lord was, for the sake of distinguishing it from tenure by knight's service, called tenure in socage, notwithstanding there was no reservation in the grant of the service of the plough.

1 Inst. 86, 87; 2 Roll. Abr. 502.

If the reservation in the grant were of a rose, a pair of spurs, or a rent, every such reservation made a tenure in socage.

1 Inst. 86.

If a man were by tenure bound to pay annually to the king a bow, an arrow, or any other instrument of war, this, notwithstanding its being tenure by petit serjeantry, as the payment was to be of a thing certain, was a species of tenure in socage.

1 Inst. 108.

If a tenant by escuage was, as often as escuage was assessed by parliament, to pay a sum certain, this was a tenure in socage; for, although the money was not to be paid at a time certain, a sum certain was to be paid.

1 Inst. 87; Bro. Ten. pl. 29.

Heretofore an inheritance might have been holden by tenure in socage *in capite*, as well as by tenure in socage.

But, by the 12 Car. 2, c. 24, tenure in socage *in capite* is changed into tenure in socage.

Tenure in socage is liable to no other services than fealty and the payment of the thing due to the lord.

Tithes. Vide "TYTHES."

TREASON.

THE word treason is derived from the French word *trahir*, which signifies to betray.

There are two sorts of treason: high treason, and petit treason.

High treason is an offence against that allegiance which is due to the king from every man who lives under his protection.

High treason is so called, by reason of the greatness of the personage against whom it is committed.

High treason, it being an offence of the most dangerous and fatal consequences to society, has, in order to deter men from being guilty thereof, at all times been punished by the law of England with the utmost severity. It has, for the same reason, been more strictly guarded against than any other offence. To every other felony an actual commission of the felony

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is necessary; but an intention to commit high treason is, in some cases, equivalent to the actual commission thereof.

β The Constitution of the United States, art. 3, § 3, defines treason against the United States to consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The act of April 30, 1790, entitled “An act for the punishment of certain crimes against the United States,” provides, “§ 1. That if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.

“§ 2. That if any person or persons, having knowledge of the commission of any of the treasons aforesaid, shall conceal, and not, as soon as may be, disclose and make known the same to the President of the United States, or some one of the judges thereof, or to the president or governor of a particular state, or some one of the judges or justices thereof, such person or persons, on conviction, shall be adjudged guilty of misprision of treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars.”γ

Petit treason consists in the murder of a person by one who was under a peculiar obligation to preserve and defend the life of the person murdered.

This offence, it being of very dangerous example, has always been punished, by the law of England, with more severity than any other murder.

Some things, which relate to the offence of high treason, have been already treated of; as commitment for high treason, under the title “COMMITMENT;” forfeiture and corruption of blood for high treason, under the title “FORFEITURE.”

The remainder of what appertains to this Title shall be ranged in the following order:—

- (A) Who may be guilty of High Treason.
- (B) Against whom High Treason may be committed.
- (C) Of High Treason in the general.
- (D) Of compassing or imagining the Death of certain Personages.
- (E) Of violating certain Personages.
- (F) Of levying War against the King.
- (G) Of adhering to the King's Enemies.
- (H) Of counterfeiting the Great Seal, Privy Seal, Privy Signet, or Sign Manual.
- (I) Of counterfeiting or diminishing the Money current.
- (K) Of bringing counterfeit Money into the Realm.
- (L) Of slaying certain Officers.
- (M) Of extolling or maintaining the Power of the See of Rome.
- (N) Of refusing a second Time to take the Oath of Supremacy.
- (O) Of putting a Popish Bull in ure.
- (P) Of reconciling any Person, or being reconciled, to the See of Rome.
- (Q) Of receiving Popish Orders or Education.
- (R) Of denying the Powers of Parliament to limit the Succession of the Crown.

(A) Who may be guilty of High Treason.

- (S) Of affirming that a Person, not in the succession, as by Law established, has a Right to the Crown.
- (T) Of endeavouring to hinder the Person, next in the Succession, as by Law established, from succeeding to the Crown.
- (U) Of corresponding with the Pretender or one of his Sons.
- (W) Of corresponding, or treating, with a Rebel or Enemy.
- (X) Of Petit Treason in the general.
- (Y) Of Slaying a Husband by his Wife.
- (Z) Of slaying a Master by his Servant.
- (Aa) Of slaying a Prelate by an Ecclesiastic who owes Obedience to the Prelate.
- (Bb) Of the Indictment of Treason.
- (Cc) Of the Trial of Treason.
- (Dd) Of the Evidence of Treason.
- (Ee) Of the Judgment of Treason.

(A) Who may be guilty of High Treason.

EVERY subject who is of the age of discretion, may be guilty of high treason.

3 Inst. 4; 1 Hawk. P. C. c. 1, c. 17, § 4.

The duty of allegiance to the king is so inseparable from a natural born subject, that, notwithstanding all he can do to renounce his allegiance, or to transfer it to a foreign prince, whatever would be high treason in another person is so in him.

1 Inst. 129; 1 Hawk. P. C. c. 17. ¶Dr. Storey's ca., Dyer, 298; Macdonald's ca., Fost. C. L. 59.¶

If a feme-covert commit high treason by the command of her husband, the command does not excuse her, as it does in the case of some other felonies.

Bac. Max. 56, 57.

In ancient times, if a madman had been guilty of an attempt upon the life of the king, it would have been high treason.

3 Inst. 6; 4 Rep. 124.

But, since the statute of the twenty-fifth year of the reign of Edward the Third, the words of which are, "When a man doth *compass or imagine* the death of our lord the king," it has been holden, that a person not *compos mentis* is incapable of *compassing or imagining*; and, consequently, that such person cannot be guilty of that species of high treason which consists in *compassing or imagining* the death of the king.

¶For some excellent remarks on that degree of madness which exempts from criminal responsibility, see Erskine's speech in defence of Hadfield, Additional Vol. of Speeches.¶ 3 Inst. 6; 1 Hawk. P. C. c. 17, § 8.

And this appears by the 33 H. 8, c. 20, § 1, by which it was enacted, "That if any person shall commit high treason when he is of good and perfect memory, and, after accusation or confession thereof, shall fall to madness, the treason done by such person shall be tried in his absence; and that the offender shall, if found guilty, suffer such pains and forfeitures as if he had been of good and perfect memory, and had been personally arraigned."

And by § 2 it was enacted, "That if any person shall be attainted of

(A) Who may be guilty of High Treason.

high treason, and afterwards fall into madness, he shall, notwithstanding such madness, have and suffer execution."

This cruel law, as it was highly reasonable it should, was soon repealed; for the design of all punishment is example, *ut pœna ad paucos, metus ad omnes perveniat*; but, when a madman is executed, it is a miserable spectacle, as well as an instance of inhumanity and cruelty, and the execution of such a man can never be an example to others.

3 Inst. 4, 6. ¶Vide 39 and 40 G. 3, c. 94.¶

The husband of a queen regnant may be guilty of high treason against his wife; because such a queen is, in the eye of the law, a distinct person, to divers purposes, from her husband.

3 Inst. 8.

And for the same reason a queen consort may commit high treason against her husband.

1 Inst. 8.

An alien, who comes into the kingdom in a hostile manner, is not thereby guilty of high treason, because he owes no allegiance to the king.

3 Inst. 11; 7 Rep. 6; Ld. Raym. 1; Salk. 632.

¶In England, it is high treason in a foreigner resident there, or who is himself abroad if his family reside there, to aid even his own countrymen, in acts of hostility, whether his sovereign be at peace or enmity with the English king, for it is a breach of the local allegiance due from him.

Rex v. Delamotte, 1 East, P. c. 53.¶

But an alien, who came at first peaceably into the kingdom, and has lived therein some time, may commit high treason: for, as he has enjoyed the protection of the king, a local allegiance is in return due from him; ¶and this whether his sovereign be in amity or enmity with the king of this country.¶

7 Rep. 6, Calvin's case. ¶But as he is not a *natural* subject of the king, the indictment shall be *contra dominum suum*, (omitting *naturalem*,) and *contra debitam allegantiam*, &c. Hob. 271; 3 Inst. 5; Hob. 271; Ld. Raym. 1; Salk. 632. ¶The 9 Ann. c. 16, styles Guiscard's correspondence with France during the war *treason*.¶

¶And it appears that an alien may even be guilty of treason in certain cases, though not *personally* under the protection of our law, as if, while seeking the protection of the crown, and having a *family and effects here*, he should, during a war with his native country, go thither, and there adhere to the king's enemies for *purposes of hostility*; for he came and settled here under the protection of the crown; and though his person was removed for the time, his effects and family continued under the same protection. This rule was laid down by all the judges assembled at the queen's command, January 12, 1707.

Fost. C. L. 185.

It is to be observed, however, that the judges in this resolution laid a considerable stress on the queen's declaration of war against France and Spain, whereby she took under her protection the persons and estates of peaceable subjects of those countries residing here, which in fact placed them on the footing of aliens coming here by license or safe conduct.¶

It seems to be the better opinion, that no ambassador from a foreign prince, nor any one of the attendants of such ambassador, can be guilty of high treason; unless he make an attempt upon the life of the king.

1 Hawk. P. C. c. 17; Fost. 187. ¶See this subject perspicuously discussed by

(B) Against whom High Treason may be committed.

Vattel, b. 5, c. 7. Vattel thinks, that even in cases of extreme delinquency by an ambassador, on the true principles of the law of nations, he is to be treated as an enemy, as having forfeited his ambassadorial character, but not to be tried by the ordinary law of the country; and see Bynkershoek, *De Foro Legat.* ch. 24, s. 5; 1 Black. C. 257, and tit. *Ambassador, ante*, Vol. i. ||

β An apprehension of having property wasted or destroyed, or of suffering other mischief not endangering the person, although well founded, affords no excuse for joining or continuing with rebels.

Rex v. M'Growther, 1 East, P. C. 71.

But it is otherwise, if he join from fear of death or compulsion.

Rex v. Gordon, 1 East, P. C. 71. γ

(B) Against whom High Treason may be committed.

HIGH treason may be committed against the person in actual possession of the crown, although such person be only king or queen *de facto*, and not *de jure*; for as the lives and properties of the people are protected by such king or queen, during his or her administration of the laws, allegiance is in return due for this protection.

3 Inst. 7; H. P. C. 12; 1 Hawk. P. C. c. 17, § 11.

By the 11 H. 7, c. 1, it is enacted, "That no person who attends upon the king for the time being, to do him true and faithful service of allegiance, or is in other places, by his commandment, in his wars, within this land or without, shall for the said deed be convicted of high treason."

And it has been holden, that, if high treason have been committed against a king *de facto*, and the king *de jure* afterwards come to the crown, the offence is still punishable as high treason.

3 Inst. 7; Bro. *Treas.* pl. 10; H. P. C. 12; 1 Hawk. P. C. c. 17, § 12.

It is, in the general, true, that high treason cannot be committed against the person who has a right to the crown, so long as a king *de facto* is in the actual possession thereof; because allegiance is only due to the latter.

3 Inst. 7; H. P. C. 12; 1 H. H. P. C. 101; 1 Hawk. P. C. c. 17, § 16.

It was indeed resolved by the judges, after the restoration of King Charles the Second, that all the acts done to prevent him from acquiring the actual possession of the crown were high treasons.

Kel. 15, The case of the Regicides.

But this resolution is quite reconcilable with what is laid down in the books last cited: for it had been first resolved by the same judges, that King Charles the Second, notwithstanding he had been for some years hindered from exercising the regal power, had all that time been king *de facto* as well as *de jure*; and it is certain, that no other person had, during that time, been in the actual possession of the crown.

Kel. 15; 1 Keb. 315, 454; 1 Hawk. P. C. c. 17, § 17.

High treason may be committed against the person on whom the crown does rightfully descend, although he have not been crowned; for it has been determined by all the judges, that the coronation of a king is only a ceremony. (a)

3 Inst. 7, Watson's case; H. P. c. 12; 1 Hawk. P. C. c. 17, § 19. [(a) "I am very far from thinking," saith Sir M. Foster, "that the solemnity of a coronation is to be considered among us merely as a royal ceremony, or as a bare notification of the descent of the crown; as authors of high distinction have been pleased to express themselves. (3 Inst. 7; 1 Hal. 61, 101.) I admit that it is, on the part of the nation, a public solemn recognition, that the regal authority and all the prerogatives of the crown are vested in the person of the king, antecedently to that solemnity. But the solemn-

(C) Of High Treason in the general.

nity of a coronation with us goeth a great deal further. The coronation oath importeth, on the part of the king, a public solemn recognition of the fundamental rights of the people; and concludeth with an engagement, under the highest of all sanctions, that he will maintain and defend those rights; and to the utmost of his power make the laws of the realm the rule and measure of his conduct." Fost. Cr. L. 189.]

As there must sometimes be a failure of justice, if there were not always a person in whose name the laws might be administered, it is a maxim *that the king never dies*; and, consequently, high treason may be committed against a king before his proclamation; for he becomes a king immediately upon the demise of the person to whom he succeeds.

3 Inst. 7; 1 H. H. P. C. 101; 1 Hawk. P. C. c. 17, § 19.

But, if the next heir to the crown be of the popish religion, or have married a papist, the crime of high treason cannot be committed against such person; for, by the 1 W. & M. st. 2, c. 1, § 9, it is enacted, "That every person who is or shall be reconciled to, or hold communion with, the see or church of Rome, or shall profess the popish religion, or shall marry a papist, shall be excluded and be for ever incapable to inherit, possess, or enjoy, the crown and government of this realm and Ireland, and the dominions thereunto belonging, or any part of the same; or to have, use, or exercise any regal power, authority, or jurisdiction within the same; and in all and every such case or cases the people of these realms shall be, and hereby are, absolved of their allegiance."

(C) Of High Treason in the general.

DIVERS offences, which are not mentioned in the 25 Ed. 3, st. 5, c. 2, were, before the making of this statute, treason.

Bro. Treas. pl. 14; 1 Hawk. P. C. 34.

It was high treason to have compassed the death of the father or uncle of the king.

3 Inst. 7.

If a subject of this realm, instead of having summoned another subject to answer in the king's courts, had summoned him to appear before the tribunal of a foreign prince, this was high treason.

3 Inst. 7.

By the 25 Ed. 3, st. 5, c. 2, after declaring certain offences to be treasons, it is enacted, "That, because many other like cases of treason may happen in time to come, which a man cannot think or declare at this present time, if any other case, supposed to be treason, which is not specified above, doth happen before any justice, the justice shall tarry, without proceeding to judgment of treason, until the case be laid before the king in parliament, and it be declared whether it ought to be adjudged treason or other felony."

3 Inst. 22, 23.

Notwithstanding this statute, some justices did presume to adjudge certain offences, not mentioned in this act, to be high treasons; but they were, for so doing, severely punished.

3 Inst. 22, 23.

In consequence of the power given by this statute, divers offences were, by different parliaments, declared to be high treasons.

3 Inst. 8, 14, 23.

(C) Of High Treason in the general.

As some of the acts of parliament by which these offences were so declared were penned in general terms, others of them in particular terms, and others in obscure terms; and as some offences which had in some parliaments been declared to be high treasons, were in other parliaments declared not to be so, the mischief, which arose from the difficulty of knowing what was or what was not high treason, became as great as it had been before the making of the 25 Ed. 3, st. 5, c. 2.

3 Inst. 14, 23.

In order to remedy this mischief, it is, by the 1 Mar. st. 1, c. 1, § 3, enacted, "That from henceforth none act, deed, or offence, being by act of parliament made treason, by words, writing, ciphering, deeds, or otherwise whatsoever, shall be taken, had, deemed, or adjudged to be high treason, but only such as be declared and expressed to be treason, in or by the act of parliament made in the twenty-fifth year of the reign of the most noble king of famous memory, Edward the Third, touching or concerning treason or the declaration of treason, and none other; any act or acts of parliament had or made at any time heretofore, or after the said twenty-fifth year of the reign of the said late King Edward the Third, or any other declaration or matter to the contrary in anywise notwithstanding."

As it is by this statute enacted, that from henceforth no offence shall be adjudged high treason, but only such as be declared and expressed to be treason by the 25 Ed. 3, st. 5, c. 2, it seems that the parliament have no power, under the 25 Ed. 3, st. 5, c. 2, of declaring any offence high treason.

1 Hawk. P. C. c. 17, § 71.

And, if this be so, it follows, that no offence is at this day high treason, unless it is declared to be so by the 25 Ed. 3, st. 5, c. 2, or has been made so by some statute subsequent to the 1 Mar. st. 1, c. 1.(a)

||(a) The statutes creating new treasons passed since the 1 Mar. st. 1, c. 1, respect, 1st, the coin; 2d, the offence of upholding the power of the pope; 3d, offences against the Protestant succession; 4th, the offence of corresponding with rebels or enemies: as to which, see *post*; and see Hawk. P. C. b. 1, ch. 2, (8th ed.); and, as to offences respecting the coin, see 1 Russell on Cri. b. 2, ch. 1, (2d ed.)||

An offence is not to be adjudged high treason, unless it be clearly, and without argument or inference, within the meaning of some act of parliament; for no statute whereby an offence is declared to be high treason, is to be extended by equity.

Plowd. 86; 3 Inst. 12, 20, 21; 18 Eliz. c. 1, § 1.

There can be no accessory in high treason.

Bro. *Treas.* 19; 3 Inst. 9, 138; H. P. C. 127, 215; 2 Hawk. P. C. c. 29, § 2.

It seems to have been always agreed, that the same thing which would have made a man an accessory before the fact in any other felony, does make him a principal in high treason.

1 Inst. 21, 138; H. P. C. 127, 215; 2 Hawk. P. C. 810.

It has been holden, that the receiving and aiding of a traitor, after the offence has been committed, does not, in the case of counterfeiting the king's money, make a man a principal in high treason.

Dyer, 296, Conier's case.

But the better opinion is, that the receiving and aiding of a man who has been guilty of counterfeiting the king's money does make the person thereof guilty a principal in high treason.

3 Inst. 8, 13; H. P. C. 127, 215; Keb. 33; 2 H. P. C. 320.

(D) Of compassing the Death of certain Persons.

By the 7 Ann. c. 21, § 1, it is enacted, "That after the first day of July, one thousand seven hundred and nine, such crimes and offences which are high treason within England shall be construed, adjudged, and taken to be high treason within Scotland; and that from thenceforth no crimes or offences shall be high treason within Scotland, but those that are high treason within England."

The distinction of high and petit treason was not known to the law of Scotland; for every offence which was by the law of England petit treason, was by the law of Scotland treason.

At this day, an offence which is in England petit treason is in Scotland only a capital offence: it being by the 7 Ann. c. 21, § 7, enacted, "That murder, under trust, which was by the law of Scotland treason, shall, for the time to come, be only adjudged and deemed to be a capital offence."

(D) Of compassing or imagining the Death of certain Personages.

By the 25 Ed. 3, st. 5, c. 2, § 1, it is declared to be high treason, "When a man doth compass or imagine the death of our lord the king, our lady his companion, or of their eldest son and heir; and thereof be provably attainted of overt deed by the people of their condition."

The word companion, in this clause, means wife.

3 Inst. 8, 9.

A queen regnant is not expressly mentioned in this clause; but the construction has been, that such a queen is within the meaning of the words *our lord the king*.

3 Inst. 7; H. P. C. 12; 1 Hawk. P. C. c. 17. *β* See Bouv. L. D. *Gender.g*

The husband of a queen regnant seems to be within the meaning of the words in this clause, *our lady his companion*: but as such husband is not expressly mentioned, it has been holden that it is not high treason to compass or imagine his death.

3 Inst. 7; H. P. C. 12; 1 Hawk. P. C. c. 17; ||and therefore the 1 & 2 P. & M. c. 10, expressly made it treason to compass the death of King Philip.||

This clause does not extend to a queen dowager; inasmuch as she is not the companion of the king.

3 Inst. 8; 1 H. H. P. C. 124; 1 Hawk. P. C. c. 17.

If the companion of a king be divorced *a vinculo matrimonii*, it is not high treason to compass or imagine her death; because she ceases to be the companion of the king.

3 Inst. 9; 1 H. H. P. C. 124.

If the eldest son of the king or queen die during the life of the king or queen, without leaving issue, this clause extends to the next son; because he thereby becomes the eldest son and heir.

3 Inst. 8; H. P. C. 12; 1 Hawk. P. C. c. 17, § 21.

But it has been doubted whether, if the eldest son of the king or queen die during the life of the king or queen, and leave issue a son, it be high treason to compass or imagine the death of such son.

1 H. H. P. C. 125, 126.

It is said that the eldest daughter of the king or queen is not within the meaning of this clause.

1 H. H. P. C. 126, 127.

(D) Of compassing the Death of certain Persons.

It is in one book laid down, that this clause does not extend to a collateral heir, notwithstanding he has been proclaimed heir-apparent: but it is added that, if a collateral heir be declared heir-apparent by act of parliament, it extends to him.

3 Inst. 9.

In another book it is doubted whether this clause does extend to any collateral heir.

1 H. H. P. C. 125.

As the words in this clause, *compass or imagine*, do imply design, it follows, that the taking away the life of one of the persons included therein is not high treason, unless it be accompanied with some circumstance of design.

3 Inst. 6; 1 Hawk. P. C. c. 17.

And before the making of the 25 Ed. 3, st. 2, c. 5, it was holden, in the case of Sir Walter Tyrrell, who shot an arrow by which William the Second was killed, that the taking away the life of this prince, by the accidental glancing of the arrow, was not high treason.

3 Inst. 6; 1 Hawk. P. C. c. 17, § 10.

But wherever a design upon the life of one of the persons comprehended in this clause is manifested by an overt act, this, although the design be not afterwards carried into execution, is high treason; inasmuch as the words of the clause are, “doth compass or *imagine*.”

H. H. P. C. 119; Kel. 17.

If divers persons meet and consult how to kill the king, this is in every one of them an overt act of compassing or imagining his death, although no method of killing him be agreed upon.

Kel. 17; Fost. 196.

Nay, the knowledge of a design to destroy the king, if accompanied with any circumstances of assent or approbation, is an overt act of compassing or imagining his death.

3 Inst. 140; H. P. C. 127; Kel. 17, 21; 1 Hawk. c. 20.

If a man, knowing that a meeting is to be holden to consult the destruction of the king, go to such meeting, this, although while there he say nothing, is evidence proper to be left to a jury of his assent to, or approbation of, the traitorous intention.

Kel. 17, 21, The case of the Regicides; 1 Hawk. P. C. c. 17.

If a man, who has been accidentally present at a meeting holden to consult the destruction of the king, go a second time to such meeting, this is evidence of his assent to, or approbation of, the traitorous design.

Kel. 17, 21, The case of the Regicides; 1 Hawk. P. C. c. 17.

Divers other acts, besides those which manifest a direct design upon the king's life, are overt acts of compassing or imagining his death.

If a man excite a foreign prince to invade the realm, this is an overt act of compassing or imagining the king's death; because such excitation has a natural tendency to bring the king's life into danger.

3 Inst. 14; H. P. C. 13; Dyer, 238; 1 Hawk. P. C. c. 17.

The assembling of men, with an intention of compelling the king to comply with certain demands, is, for the same reason, an overt act of compassing or imagining his death.

3 Inst. 12; H. P. C. 13; Kel. 21; Moor, 621.

(D) Of compassing the Death of certain Persons.

If divers persons are assembled for the purpose of imprisoning the king, this is an overt act in every one of them of compassing or imagining his death; inasmuch as it is probable that such imprisonment will end in his death.

3 Inst. 6, 12; H. P. C. 11; 1 Hawk. P. C. c. 17.

It hath been doubted, whether the assembling of men with design to depose the king be an overt act of compassing or imagining his death; because there may, as it is said, be a design to depose the king without an intention to take away his life.

Bro. *Treas.* pl. 24.

But it seems to be the better opinion, that the assembling of men with design to depose the king is an overt act of compassing or imagining his death: because, if this design be carried into execution, the death of the king will, in all probability, be the consequence.

3 Inst. 6, 12; H. P. C. 11; 2 Ventr. 316; 11 Mod. 322; 1 Hawk. P. C. c. 17. [This better opinion hath been confirmed by the Judges in the late trials for treason. Vide Hardy's Trial, by Gurney.]

It is said that a conspiracy to levy war against the king is not an overt act of compassing or imagining his death; for that, as the levying of war is, by another clause of the statute, declared to be one species of treason, such conspiracy ought not to be deemed an overt act of another species of treason; for that, if it should be so deemed, two species of treason would be confounded.

3 Inst. 14.

But it has been resolved by all the Judges, that although the persons so levying war may be indicted for the treason of levying war, they may nevertheless be indicted for compassing or imagining the king's death; and that the levying of war may be laid as an overt act of compassing or imagining the king's death.

Kel. 20, 21, The case of the Regicides.

And in this case, besides expressly denying what is laid down in 3 Inst. 14 to be law, it is said that what is there laid down is contrary to the cases of Lord Cobham and the Earl of Essex, which are cited by Coke, Chief Justice, but two pages before: in the last of which it had been holden, that the gathering of men together, with a design to compel the queen to comply with certain demands, was an overt act of compassing or imagining her death.

But, perhaps, upon considering the two passages, they will be found quite consistent. The design, in the cases of Lord Cobham and the Earl of Essex, was to get the queen into the power of the persons assembled. But in 3 Inst. 14, Coke, Chief Justice, only speaks of a levying war against the king generally. Now, although the two propositions, that levying war with a design against the person of the king is an overt act of compassing or imagining his death, and that levying war against the king generally is not so, should not be both law, they are by no means contradictory to each other. But it may be fairly inferred, from two modern books, that both the propositions are law.

3 Inst. 12; ||Hale's P. C. 109.||

In one of these, it is said to have been resolved by the Court of King's Bench, at a trial at bar, that a conspiracy to levy war in order to depose the king, which would be the civil death of the king, is an overt act of

(D) Of compassing the Death of certain Persons.

compassing or imagining his death, but that a conspiracy to levy war against the king generally is not so; because there may be such a levying of war as is treasonable, without an intention to depose the king.

11 Mod. 322, Dorrel's case, Mich. 2 G. 1.

In the other, these words are used in treating of that species of treason which consists of compassing or imagining the king's death:—"It hath been adjudged, that levying war against the king's person, or the bare consulting to levy such war, is an overt act of compassing or imagining his death." But the book does not say that the levying of war, or the consulting to levy a war, against the king generally, is so.

1 Hawk. P. C. c. 17.

Writing.—It seems to be agreed that the publishing of written or printed words may be an overt act of compassing or imagining the king's death. And it has been holden, that the printing of a book containing treasonable positions, and sending it in a box to the king, is a publication of the book.

2 Roll. Rep. 88, William's case.

If any words, in writing or print, are published, which have a direct tendency to alienate the affections of the people from the king, such publication is an overt act of compassing or imagining his death: because this will, in all probability, be the consequence.

Dyer, 298; 2 Roll. Rep. 89; 1 Hawk. P. C. c. 17.

The publishing of a printed book, or sending of a letter, to excite a foreign prince to invade the realm, is an overt act of compassing or imagining the king's death: for, if there should be an invasion, his life would certainly be in danger.

3 Inst. 14; H. P. C. 13.

If a book be published, in which it is asserted, that it is high time for the people to take the government into their own hands, and that it is honourable and conscientious to throw off all allegiance, and to put the king to death, this is an overt act of compassing or imagining the king's death.

Kel. 22, 23, Twyne's case.

It has been holden, that to publish in writing or print a prophecy of the king's death, is an overt act of compassing or imagining his death.

2 Roll. Rep. 88, 89, William's case.

But in another book it is said, that to prophecy the king's death does not seem to be an overt act of compassing or imagining his death.

1 H. H. P. C. 108.

And it is in the same book expressly laid down, that to calculate the king's nativity is not an overt act of compassing or imagining his death.

H. P. C. 11; 1 H. H. P. C. 108.

It has been holden, that the writing of words which contain a treasonable position does, although the same are never published, amount to an overt act of compassing or imagining the death of the king; for that *scribere est agere*.

2 Roll. Rep. 89, William's case; 3 St. Tri. 733, Sidney's case; Cro. Car. 125, ||Peachum's case. See Sir M. Foster's remarks on the last case, and on the infamous manner in which the judgment was procured. Fost. Cr. Law, 199; and see 2 Sta. Tri. 870, (8vo ed.); Bacon's Letters, 111, 117.||

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But it seems to be the better opinion, that the writing of such words, unless they relate to some determinate treasonable design upon the king's life, does not, whilst the words remain in the hands of the writer unpublished, amount to an overt act of compassing or imagining the king's death; because they may have been written merely by way of amusement, and without any traitorous design.

1 Hawk. P. C. c. 17, § 32; Fost. 198.

Words.—It is laid down in two books, that the bare speaking of words can never be an overt act of compassing or imagining the king's death; and from the special acts of parliament, made at different times after the 25 Ed. 3, st. 5, c. 2, to attain persons guilty of speaking treasonable words, it is inferred, that such words are not an overt act of compassing or imagining the king's death within the meaning of that statute; for that, if they are so, the special acts would have been quite nugatory.

3 Inst. 14, 38, 140; 1 H. H. P. C. 111, 112.

It is in other books laid down, that the bare speaking of words may be an overt act of compassing or imagining the king's death; for that words are the most natural way of expressing the imagination of the heart.

St. P. C. 2; Yelv. 107; Kel. 13; 1 Lev. 57; Salk. 631; 3 Mod. 55; 1 Hawk. P. C. c. 17, § 32.

In a modern book it is said, that the rule which has been laid down since the Revolution is, that the speaking of words not relative to a design upon the king's life does not amount to an overt act of compassing or imagining his death; but that the speaking of words relative to a design upon the king's life does amount to an overt act of compassing or imagining his death.

Fost. 200. || Lord Coke lays it down, in 3 Inst. 5, that before the statute of Edw. 3, mere words might be a sufficient overt act of treason, though he admits that since the statute they are not so. Ibid. 14. Mr. J. Foster has controverted this opinion at length, and has shown that the passages cited by Lord Coke from Bracton, Britton, and Fleta, do not bear out his assertion. The question is the more important, because, as observed by Foster, if it be admitted that words at common law amounted to an overt act, it is at least doubtful whether the words *open deed* in the statute have altered the case. Fost. C. L. 205, 207. Vide Montesquieu's Remarks on Traitorous Words and Writings, Esp. des L. l. 12, c. 12, 13.||

The speaking of these words, *If I meet the king, I will kill him*, has been holden an overt act of compassing or imagining his death.

1 Lev. 57, Allcock's case. || Vide Crohagan's case, Cro. Ca. 332, and Foster's remarks on it. Fost. C. L. 202.||

It has been holden, that the speaking of these words, *The king, being excommunicated by the pope, may be deposed and killed by any whatsoever, which killing is not murder*, is an overt act of compassing or imagining his death.

1 Roll. Rep. 185, Owen's case.

And it is said by Holt, Chief Justice, that it is not necessary that the words should in such case be express: for that the speaking of any words, provided the jury are fully convinced, from the tenor of them, that the speaker had a design upon the king's life, is an overt act of compassing or imagining his death.

4 Stat. Tri. 723, Lowick's case.

It is laid down, that the speaking of words, which plainly show a design upon the king's life, is an overt act of compassing or imagining his death;

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although the design be future or conditional, or both future and conditional.

St. P. C. 2; Yelv. 107; Kel. 13; 2 Mod. 55; 1 Hawk. P. C. c. 17.

It seems to be agreed, that the speaking of words in contempt or disgrace of the king's person, as where the import of the words is a charge of a personal vice or a personal defect, is not an overt act of compassing or imagining his death.

Cro. Car. 125, Pine's case; 1 Hawk. P. C. c. 17; §3 Stat. Tri. 359. It is now settled that bare words, not relative to any act or design, however wicked, indecent, or reprehensible they may be, are not in themselves overt acts of high treason, but only misprisions, punishable at common law, by fine, imprisonment, or other corporal punishment. East's P. C. vol. i. p. 117.¶

It is in some books laid down, that to say the king is a bastard, or to say that another person has a better title to the crown than him, is an overt act of compassing or imagining his death; because it discovers the mind to be traitorous.

Yelv. 107; 2 Roll. Rep. 90; Palm. 426.

But it is in one case said by Holt, C. J., that the speaking of loose words, which have no relation to any act or project, is not an overt act of compassing or imagining his death.

Salk. 631, Charnock's case.

¶In the cases of Hardy, Horne Tooke, and others, the doctrine relating to the constructive treason of compassing and imagining the death of the king underwent much discussion. The indictment charged, as overt acts of compassing his death, that the prisoners conspired with others to procure a convention to be assembled, in order that such convention might, without authority of parliament, subvert the legislature and government of the country, and depose the king—that the conspirators wrote and published pamphlets, letters, resolutions, and addresses, containing incitements to the people to send delegates to the convention—that they met and consulted concerning the assembling, and the means of inducing the people to send delegates—that they caused arms to be provided for arming the king's subjects, to oppose the king in the exercise of his lawful authority, and that they might subvert the legislature and government, and depose and assist in deposing the king. The Lord C. J. Eyre, in summing up, in Horne Tooke's trial, said, it could not be denied that he who meant to depose the king, compassed and imagined his death. It was a presumption of fact so undeniable, that the law had adopted it and made it a presumption of law. And in his preliminary charge to the grand jury, previous to the trial of Hardy, the C. J. Eyre says, that the instances of overt acts of this species of treason put by Sir M. Hale, and Sir M. Foster, are of conspiracies to depose the king, to imprison him, to get his person into the power of the conspirators, to procure an invasion of the kingdom. His lordship(a) goes on to lay down that a design to overthrow the government of the country must necessarily involve in it the compassing and imagining the death of the king: that a project to bring the people together in convention, in imitation of the national convention in France, in order to usurp the government of the country, and any one step taken towards bringing it about, would be a case of the clearest high treason in compassing the death of the king. With respect to the project of a convention, not for usurping the government, but for effecting a parliamentary reform without the authority of parliament, his lordship considered that steps taken to-

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wards it would be high treason in the actors. Whether the project of a convention sufficiently powerful to overawe the legislature, and extort from it a parliamentary reform, would, if acted on, amount to the specific high treason of compassing the king's death, he thought a more doubtful question.

Rex v. Hardy, Sta. Tri. v. 24; *Rex v. Horne Tooke*, Ibid. v. 25, (8vo ed.) (a) The doctrines of this charge were attacked, immediately after its delivery, in a pamphlet, called "Cursory Strictures, &c., &c.," reprinted in vol. 24 of the St. Tri. p. 210. It must be admitted that the constructive treason of compassing the king's death is carried somewhat further by the Lord C. J. than any of the previous decisions, or than the authority of Hale and Foster. To hold a design of deposing the king, evidence of compassing his death perhaps requires no great latitude of construction, though this was doubted by Broke, C. J., in the reign of H. 8, and he says an act was therefore made expressly for it under H. 8, and E. 6, Bro. Abr. *Treason*, pl. 24. To make the procurement of an invasion of the kingdom evidence of the same heinous personal design, was certainly departing further from the letter of the statute of 9 E. 3; but to hold that an individual engaging in a scheme for a convention to obtain parliamentary reform without the authority of parliament, (criminal and dangerous as such a scheme is,) must necessarily be actuated by treasonous intentions against the life of the sovereign, is surely a construction much too strained to be applied to the interpretation of the most penal laws in the criminal code. With respect to the last of the three cases alluded to by C. J. Eyre,—which he himself styles "a new and doubtful case," and as to which, if it appeared in evidence, he directs the grand jury to find a true bill, in order that the case may be put into a "judicial course of inquiry,"—perhaps this was a case in which, according to the provision of the statute of Edw. 3, "the justices should tarry without going to judgment of the treason till the cause should be showed and declared before the king and parliament, whether it ought to be adjudged treason or other felony." Lord Hale, and many of the judges in the weavers' case, which was a new case, thought a declarative act proper. Hale's P. C. 147. The truth appears to be that the 36 G. 3, c. 7, was a law much needed and highly salutary. The 25 Edw. 3, had confined the law of treason within too narrow limits for the protection of the monarchy in a free, advanced, and populous condition of society. Judges had been induced to remedy the defect by a latitude of construction which certainly departed further from the letter of the law than in any other instance; and it is scarcely too much to say, that new treasons were, in fact, created by judicial authority, contrary to the express letter of the statute of Edw. 3. The act of 36 G. 3, has, in effect, much curtailed the doctrine of constructive treason, by converting those dangerous and criminal acts of rebellion and sedition, which had been so often the subject of prosecution as overt acts of compassing the king's death, into specific treasons. The law is thus at once simplified and rendered certain; and the definitions of the crime are now so specific and unambiguous as, in a great measure, to exclude judicial construction from extending them by analogy.

By the 36 Geo. 3, c. 7, (made perpetual by 57 Geo. 3, c. 6,) after reciting that the lords spiritual and temporal, and commons, considering the daring outrages offered to his majesty's person in his late passage to and from parliament, and the attempts of wicked persons to disturb the tranquillity of his majesty's kingdom, particularly by seditious pamphlets and speeches, had judged it necessary to provide a further remedy against treasonable and seditious practices, it is enacted, "That if any persons, after the passing of that act, should, within the realm or without, compass, imagine, invent, devise or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the king, his heirs or successors, or to deprive or depose him or them from the style, honour, or kingly name of the imperial crown of this realm, or of any other of his majesty's dominions, or to levy war against his majesty within this realm, in order by force or constraint to compel him to change his measures or councils, or in order to put any force or constraint upon, or to intimidate or overawe both or either house of parliament, or to move or stir any foreigner or stranger with force to invade this realm or any other his majesty's dominions, and such compassings,

(E) Of violating certain Personages.

imaginations, &c., shall express, utter, or declare by publishing any printing or writing, or by any overt act or deed, being legally convicted, every such person shall be adjudged a traitor, and suffer death, and lose and forfeit as in cases of treason."

The second and last counts of the indictment against Despard and others, tried and executed in 1803, were framed on this act. The second count for compassing the imprisonment and restraint of the king's person; the last count for compassing to depose the king from the style, &c., of the imperial crown of this realm. Sta. Tri. 28, p. 362; so also were the second and fourth counts of the indictment against Watson, 1817. Sta. Tri. 32, p. 1; so also were the second and last counts of the indictment against Brandreth, 1817. Ibid. 755; and all the counts in the indictment against Thistlewood, 1820. Sta. Tri. v. 33, p. 702.

By § 5, persons accused of treason under this act are to be entitled to the benefit of the statutes 7 Will. 3, c. 3, and 7 Ann. c. 11, as to trials for treason; and § 6 provides that the act is not to prevent a prosecution at common law, unless the party has been first prosecuted under this act. ||

(E) Of violating certain Personages.

By the 25 Ed. 3, st. 5, c. 2, it is declared to be high treason, "If a man do violate the king's companion, or the eldest daughter of the king, not being married, or the companion of the eldest son and heir of the king; and thereof be provably attainted of overt deed, by people of his condition."

The word violate in this clause does mean no more than carnally know; for if a man have carnal knowledge of one of the personages therein comprehended with her consent, he is equally guilty of high treason as if he have had it by force.

3 Inst. 9.

The word companion in this clause means wife.

3 Inst. 8, 9.

This clause does not extend to the violation of a queen dowager or a princess dowager; because neither of these is the companion of the king, or of the eldest son and heir of the king.

3 Inst. 8, 9; H. P. C. 12; 1 Hawk. P. C. c. 17, § 22.

If carnal knowledge have been had of one of the personages comprehended within this clause with her consent, she is guilty of high treason.

3 Inst. 9; 1 H. H. P. C. 125.

If one of the personages, whom it would have been high treason to violate during coverture, be divorced *a vinculo matrimonii*, it is not high treason to violate her; because such personage does, after the divorce, cease to be the companion of the king, or of the eldest son and heir of the king.

3 Inst. 9; 1 H. H. P. C. 124.

It is laid down, that the eldest daughter of a queen regnant, not being married, although not within the words of this clause, is within the meaning thereof.

3 Inst. 7; H. P. C. 12; 1 Hawk. P. C. c. 17, § 22.

If the eldest daughter of the king or queen die during the life of the king or queen, the violation of the next daughter, who thereby becomes the eldest, while she is unmarried, is high treason; for by the words the *eldest daughter*, the eldest at the time of the violation is intended.

3 Inst. 9.

As it has been shown who is eldest son and heir of the king or queen,

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within the meaning of the 25 Edw. 3, st. 5, c. 2, it is sufficient in this place to say, that the violation of the companion of such eldest son and heir is high treason.

Ante, p. 386.

A conspiracy, although the intention of the conspirators be to bring about the violation of one of the personages comprehended in this clause, does not amount to an overt act of violating; for as the words thereof are *doth violate*, an actual violation is necessary to the completion of the offence.

3 Inst. 9; H. P. C. 13, 14; 1 Hawk. P. C. c. 17.

But if there have been a conspiracy to violate, and the intended violation be afterwards perpetrated, the conspiracy is an overt act of every one of the conspirators of violating; inasmuch as there can be no accessory in high treason.

3 Inst. 9, 10, 138; H. P. C. 14; Kel. 19; 1 Hawk. P. C. c. 17.

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By the 25 Ed. 3, st. 5, c. 2, it is declared to be high treason, "If a man do levy war against our lord the king in his realm, and thereof be provably attainted of overt deed by people of his condition."

§ To constitute a levying of war, there must be an assemblage of persons for the purpose of effecting by force some treasonable act. *Ex parte Bollman and Swartwout*, 4 Cranch, 75. See 1 Burr's Trial, 14.

Although this clause does not mention a queen regnant, the construction has been that such a queen is within the meaning of the words, *our lord the king*.

3 Inst. 7; H. P. C. 12; 1 Hawk. P. C. c. 17.

As Ireland, although a part of the dominions of the crown of England, is not part of the realm of England, levying war against the king in Ireland is not a levying of war against him *in his realm*: but there are the same laws, and some others, concerning high treasons in Ireland as there are in England.

1 H. H. P. C. 155.

The laws of England concerning high treasons are, by the 7 Ann. c. 22, § 1, expressly extended to Scotland: it being thereby enacted, "That such crimes and offences as are high treason within England, shall be construed, adjudged, and taken to be high treason within Scotland;" and, consequently, levying war against the king in Scotland is high treason within the meaning of the 25 Ed. 3, st. 5, c. 2.

Every assembling of a number of men, although they are armed with weapons offensive and defensive, is not such a levying of war against the king as is within the meaning of this clause.

For it is, by another clause of 25 Ed. 3, st. 5, c. 2, declared, "That if any man doth ride armed, openly or secretly, with a number of armed men against any other, to slay him, or to rob him, or to take and detain him until he pay a fine or a ransom for his deliverance, it is not the intent of the king and his council, that in this case it be adjudged high treason; but that it be adjudged felony or trespass, according to the law of the land heretofore used, and according to what the case may require."

Although the words of this clause do extend only to the cases of a number of persons armed being assembled with intention to kill, rob, or imprison, the equity thereof extends to all risings to assert a private right; or to

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destroy particular enclosures; or to remove a nuisance which affected, or was thought to affect, in point of interest, the persons assembled; or to break prison, in order to relieve particular persons; because every such offence, although it have a warlike appearance, is not raised against the king or his royal majesty, but for a purpose of a private nature.

1 H. H. P. C. 135, 149, 260; Fost. 209, 210.

Five of the judges were of opinion that the rising of the weavers in and about London to destroy all engine-looms, by the use of which some persons were enabled to undersell others who did not use such looms, did not amount to an overt act of levying war against the king. The affair was considered by those judges, and in my opinion rightly, as a private quarrel betwixt men of the same trade concerning the use of particular engines which was thought to be detrimental to those concerned in the rising. Five of the judges were, indeed, of a different opinion; but the Attorney-General thought proper to proceed against the insurgents as for a riot only.

Fost. 210.

It has been holden by all the judges, that it is lawful for all the king's subjects to arm themselves, without any special commission for so doing, in order to suppress a riot or a rebellion.

Poph. 121, 122; 2 And. 67.

If a number of men, armed with weapons offensive and defensive, are assembled with a treasonable design, this is an overt act in every one of them, of levying war against the king, although nothing further be done.

5 Stat. Tr. 37, Vaughan's ca.; Salk. 635, S. C. {See 4 Cran. 75, Ex parte Bollman & Swartwout; Ibid. 470, United States v. Burr.}

But the being in company with such as are guilty of levying war against the king, is not in all cases an overt act of such levying war.

It was found, by a special verdict, that divers persons, who were in company with those who had levied war against the king, had joined them *pro timore mortis*. It was adjudged, that this was not an overt act of levying war against the king; because what they did was done for fear of death.

3 Inst. 10. {Nothing will excuse the act of joining an enemy but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property. 2 Dall. 87, 347.}

||But the fear of having houses burnt or goods spoiled is no excuse in the eye of the law for joining and marching with rebels. The only force that doth excuse is a force *upon the person*, and present fear of death; and this force and fear must continue all the time the party remains with the rebels.

Fost. C. L. 14, 216.||

It was found by a special verdict, that a great number of persons armed were assembled under the pretence of pulling down bawdy-houses; that the defendant was amongst them, throwing up his cap, and hallooing, with a staff in his hand; and that, whilst he was amongst them, he was knocked down by a party of the king's soldiers who came to suppress them, and was then taken: but as the verdict did not find any particular act of force committed by the defendant, or that he was aiding or assisting to the rest, the judges all agreed, that this was not an overt act of levying war against the king; because it is possible he might have been there only out of curiosity.

Kel. 73, 79, Green's case; Lord Raym. 1585.

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But if a man have attended one of the principal persons amongst the insurgents, from the beginning of an insurrection, this, although he was not privy to the design, is an overt act of levying war against the king.

Moor, 621, 622; Kel. 76, 77.

Every assembling of a number of men in a warlike manner, to withstand the king's lawful authority, is an overt act of levying war against the king.

3 Inst. 9; 1 Hawk. P. C. c. 17.

The defending of a fort or castle against the king's forces is an overt act of levying war against the king.

Bro. *Treas.* pl. 24; 3 Inst. 10; H. P. C. 14.

An insurrection to raise the price of servants' wages, contrary to the statute of labourers, was holden by all the judges to be an overt act of levying war against the king; because the offenders took upon themselves the reformation of the law, which subjects, by the gathering of power, ought not to do.

3 Inst. 10. ¶ See Mr. Luders's sensible observations on this case, (which is given by Lord Coke, without name, date, or authority,) from which it appears at least doubtful whether it was not decided on some of the temporary statutes of treason in force in the reign of Hen. 8, and now repealed. Mr. Luders mentions a case in 1600, at the Essex assizes, much of the same kind, where the parties were tried for conspiracy, and sentenced to one year's imprisonment. Luders's *Considerations on Law of High Treason*, &c., Bath, 1808.¶

It is in two books laid down generally, that if a number of men assemble in a warlike manner, in order to deliver men out of prisons, this is an overt act of levying war against the king.

3 Inst. 9; 2 And. 4; ¶ Kel. 57. *acc.* ¶ But see Fries' Trial, Pamph. 7

In other books it is laid down, that an insurrection with a design to break open one jail, and set the prisoners therein at liberty, is not an overt act of levying war against the king, but that an insurrection with a design to break all prisons, and set all prisoners at liberty, is.

Kel. 57, 77; 1 Ventr. 251.

Every assembling of a number of men, in a warlike manner, with an intention to reform the government or the law, is an overt act of levying war against the king.

3 Inst. 9, 10; Poph. 122; Kel. 76, 77; 1 Hawk. P. C. c. 17.

{An insurrection to prevent the execution of a public statute by force and intimidation is treason by levying of war.

2 Dall. 346, *United States v. Vigol*; Ibid. 348, *United States v. Mitchell*.}

The Earl of Essex went from his house with a number of armed men into the city of London, and prayed the assistance of the citizens to force his way to the queen, in order to remove his enemies from her person. This was adjudged an overt act of levying war against the queen.

Moor, 621, *Earl of Essex's case*; ¶ *Sta. Tri.* vol. i. 1334, (8vo ed.)¶

A number of persons armed in a warlike manner went to Lambeth House with a design to seize the Archbishop of Canterbury, who was one of his majesty's privy councillors. This was holden to be an overt act of levying war against the king.

Cro. Car. 589, *Bensted's case*. ¶ Foster says, if this attempt were made in order to take revenge on the archbishop for measures pursued by the king at his instigation, the judgment is explained; but otherwise he does not think the offence treason. *Fost. C. L.* 212, 213.¶

(F) Of levying War against the King.

An insurrection, with an intention to alter the religion established by law, is an overt act of levying war against the king.

3 Inst. 9; H. P. C. 14; Poph. 122; 1 Hawk. P. C. c. 17.

Every assembling of a number of men, in a warlike manner, with a design to redress a public grievance, is an overt act of levying war against the king; because this, it being an attempt to do that by private authority which only ought to be done by the king's authority, is an invasion of the royal prerogative.

3 Inst. 9; H. P. C. 14; Kel. 71; Sid. 358; 1 Hawk. P. C. c. 17.

An insurrection, *modo guerrino*, with a design to pull down *all* bawdy-houses, was holden to be an overt act of levying war against the king.

Messenger's case, Kel. 71; Sid. 358; *1 Burr's Trial*, 408; § 6 Sta. Tri. 879, (8vo ed.) Hale, C. B. *dissent.*; and see his strong reasons, H. P. C. 134. The word "*all*" is not in the special verdict; but the judges decided on the ground that the insurrection was to pull down bawdy-houses *in general*, and not any *particular* houses. § The assembling of men, armed and arrayed in a warlike manner, for purpose of a private nature only, is not treason. Fries' Trial, Pamph. §

§ On the authority of this and other cases, it was resolved by all the judges in 1710, that an insurrection of a mob, without military array or arms, with the intent of destroying meeting-houses generally, was levying war against the king within the statute of Edw. 3, for since the meeting-houses of protestant dissenters were, by the Toleration Act, taken under protection of the law, the insurrection was to be considered as a public declaration by the rabble against that act, and an attempt to render it ineffectual by numbers and open force. This appears to have been the first case of adjudged treason of this species where the conspirators used no arms or martial array. Lord Hale (*a*) lays it down that the assembling to do unlawful acts, unless done *modo guerrino*, is not treason, but riot. Mr. J. Foster (*b*) thinks no great stress is to be laid on this distinction, notwithstanding the words, arrayed in warlike manner, are always inserted in the indictment. All the previous cases appear, however, to have had more or less of the ingredient of *armed force*; and it certainly is difficult to understand how, according to the widest latitude of construction, war is to be levied without weapons or warlike preparations.

Damaree's case, Fost. 213; Sta. Tri. 15, p. 522. (*a*) H. P. C. 131. (*b*) Fost. 208. Vide Mr. Luders's observations on this case. Considerations on the Law of High Treason, p. 17, 50. Mr. L. contends, with much ability, and on a careful review of all the cases in the books, that the words "levying war," in the statute, must be intended to mean such wars as were levied when the statute passed, and not civil insurrections short of public rebellion. He asserts that no authority is to be found in the books, before Lord Coke, for construing these words in a technical and figurative sense different from the plain and obvious one; and he contends that the two characteristics of this species of treason relied on in the cases, the "assuming of royal power," and the more modern one of the *generality* of the mischievous intentions, are bad in their origin, and uncertain, and inconsistent. This latter circumstance has, however, been frequently relied on by judges in modern times—by Lord Mansfield in his charge in Lord George Gordon's case, by Bayley, J., in that in Watson's case, and Richards, C. B., in Brandreth's case. § If a body of people conspire and meditate an insurrection to oppose a statute law of the United States by force, and proceed no further, they are guilty of a high misdemeanor; but if they proceed to carry their intention by force, they are guilty of treason. Fries' Trial, Pamph.; United States v. Mitchell, 2 Dall. 348. §

If a number of men assemble in a warlike manner, with a design to throw down *all* enclosures, this is an overt act of levying war against the king.

3 Inst. 10; H. P. C. 14; 1 Hawk. P. C. c. 17.

(G) Of adhering to the King's Enemies.

But if a number of men, armed in a warlike manner, are assembled with an intention of only throwing down a particular enclosure, by which they are prevented from enjoying a right of common, this may amount to a rout or riot, but it is not an overt act of levying war against the king; because the design in this case is the redress of a private grievance.

3 Inst. 10; H. P. C. 14; 1 Hawk. P. C. c. 17; ||Kelyng, 75; Fost. 211, *acc.* Vide this distinction recognised by Bayley, J., in Watson's case, 32 Sta. Tri. 4; and Richards, C. B., in Brandreth's case, Ibid. 928.||

As the words of this clause are *do levy war*, a conspiracy with an intention to levy war against the king does not amount to an overt act of levying war against him.

3 Inst. 9; H. P. C. 13, 14; 1 Hawk. P. C. c. 17.

But if there have been such conspiracy, and war be afterwards levied, the conspiracy is, in every one of the conspirators, an overt act of levying war against the king, inasmuch as there can be no accessory in high treason.

3 Inst. 9, 10, 138; H. P. C. 14; Kel. 19; 1 Hawk. P. C. c. 17.

||Lord George Gordon was indicted in 1781 for high treason in levying war against the king, and the case for the crown was, that the prisoner, by assembling a great multitude with martial array, and encouraging them to surround the houses of parliament, and commit different acts of violence, particularly burning the Roman Catholic chapels, had endeavoured to procure the repeal of an act of parliament, viz., 18 Geo. 3, c. 60. Lord Mansfield laid it down in his charge, that it was the unanimous opinion of the court, (consisting of himself, Willes, Ashurst, and Buller, Js.,) that an attempt, by intimidation and violence, to force the repeal of a law, was a levying war against the king, and high treason. The prisoner was acquitted.

Doug. R. 569; Sta. Tri. vol. 21.

§ Any insurrection or rising of any body of the people within the United States to attain or effect any object of a public nature, or of public and general concern, by force or violence, is a levying of war against the United States within the meaning of the Constitution.

United States v. Fries, Pamph. 167. See 4 Cranch, 471.*g*

By the 36 Geo. 3, c. 7, (made perpetual by 57 G. 3, c. 6,) it is made high treason to compass, imagine, invent, devise, or intend to levy war against his majesty, his heirs, and successors within the realm, in order, by force or constraint, to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe both or either house of parliament, such compassings, imaginations, inventions, devices or intentions being expressed, uttered, or declared by publishing any printing or writing, or by any overt act or deed.||

(G) Of adhering to the King's Enemies.

By the 25 Ed. 3, st. 5, c. 2, it is declared to be high treason, "If a man be adherent to the enemies of our lord the king, in the realm, giving to them aid or comfort in his realm, or elsewhere; and thereof is provably attainted of overt deed by people of his condition."

A queen regnant is not mentioned in this clause; but the construction has been, that such a queen is within the meaning of the words *our lord the king*.

3 Inst. 7; H. P. C. 12; 1 Hawk. P. C. c. 17, § 20.

(G) Of adhering to the King's Enemies.

The word *enemies* in this clause is not confined to the subjects of a state at war with the king; for if any of the subjects of a state in amity with the king have commenced, or have made preparations for the commencing of hostilities against the king, these are his enemies.

If any subjects of a state in amity with the king are in the service of a state at war with the king, the giving aid or comfort to these is adhering to the king's enemies; for they are to be considered by all states, except that of which they are subjects, as the subjects of the state in whose service they are.

Salk. 635, Vaughan's case. β The word subject means one who is subjected to some sovereign power, and is not barely connected with the idea of territory; it refers to one who owes obedience to the laws, and is entitled to partake of the elections into public office. *Respublica v. Chapman*, 1 Dall. 60. γ

It was holden, that the Scots, who invaded the realm in the reign of Queen Elizabeth, were the queen's enemies within the meaning of this clause; although there was at that time no war betwixt England and Scotland.

Duke of Norfolk's case, 1 H. H. P. C. 164.

If the French king should, in time of peace, send an army to one of the seaports of France, with a design to invade any part of the king's dominions, every French subject in that army would be one of the king's enemies.

5 Stat. Tr. 37, Vaughan's case.

It has been holden, that adhering to the subjects of a state at war with the king, against the king's allies, is an adhering to the king's enemies.

Salk. 635, Vaughan's case; 1 Hawk. P. C. c. 17, § 28.

Aiding or comforting the king's subjects, who have levied war against him, makes the person who does this a principal in the high treason of levying war against the king; but it is not an adherence to the king's enemies; because such subjects are not enemies, but traitors.

3 Inst. 11; H. P. C. 14, 115; 3 Inst. 11.

β If a citizen of the United States should go from an enemy's ship, where he was a prisoner, to the shore, with an intention peaceably to procure provisions for the enemy, with a promise that he should be liberated, and who should fail to procure such provisions, would not be guilty of treason; but if his intentions were to procure them forcibly, and he proceeded on the way towards the shore, it would be treason, though his object should be defeated; or if a person having provisions with him, proceed towards the enemy with intent to supply him, it is treason, though he may be defeated.

United States v. Pryor, 3 Wash. C. C. R. 234. γ

The giving of any kind of aid or comfort to the king's enemies is an overt act of adhering to them.

3 Inst. 10; H. P. C. 14; 1 Hawk. P. C. c. 67, § 28.

If a castle belonging to the king be surrendered for reward to his enemies, this is an overt act of adhering to them.

3 Inst. 10; H. P. C. 14; 1 Hawk. P. C. c. 67, § 28.

The enlisting of a man, and sending him into the service of a state at war with the king, is an overt act of adhering to the king's enemies.

3 Ventr. 31, Harding's case; {1 Dall. 39, *Respublica v. Roberts*; 2 Dall. 87, *Respublica v. M'Carty*.}

(G) Of adhering to the King's Enemies.

If one of the king's subjects be enlisted into the service of a state at war with the king, and march, this is an overt act of adherence to the king's enemies.

Salk. 635, Vaughan's case.

If a man take a commission to cruise in one of the ships of a state at war with the king, against the king's ships or against the ships of his subjects or allies, and go on board the ship, this is an overt act of adhering to the king's enemies, although he never commit any act of hostility.

5 Stat. Tr. 37, Vaughan's case; Salk. 635. ¶Vide Evans's case, East, P. C. 80.¶

But if one of the king's subjects do reside in a state at war with the king, without giving any assistance to the carrying on of the war, this is not an overt act of adhering to the king's enemies.

1 H. H. P. C. 165.

In a late case it was insisted for the defendant at a trial at bar, that sending letters of advice or intelligence to the subjects of a state at war with the king is not an overt act of adhering to the king's enemies.

MS. Rep. Hensey's case, Trin. 31 G. 2; 1 Burr. 646; 10 Stat. Tr. App. 77. ¶See Walpole's Mem. of Geo. 2, vol. ii. p. 312.¶ [Rex v. Stone, 6 Term R. 529, S. P.] ¶Fost. C. L. 217, 218.¶ {See 1 Dall. 35, Respublica v. Carlisle.}

And from the 2 & 3 Ann. c. 20, § 34, by which it is enacted, "That if any officer or soldier in her majesty's army shall give advice or intelligence to any enemy of her majesty, either by letters, messages, signs, or tokens, or in any way whatsoever, such person shall be adjudged guilty of high treason," it was inferred, that if the giving of such intelligence had before been an overt act in every subject of adhering to the king's enemies, it was unnecessary to enact, by a new statute, that the doing thereof should be high treason in an officer or soldier. But the judges of the Court of King's Bench were clearly of opinion, that the sending of such letters is an overt act of adhering to the king's enemies; and it was said that the same had been holden by the judges in Gregg's case, which was subsequent to the statute of the 2 & 3 Ann. c. 20.

It was likewise resolved in this case, that the sending of such letters, although they were intercepted at the post-office and did not go, is an overt act of adhering to the king's enemies; and it was said that the same had been holden by all the judges in Gregg's case.

A conspiracy, with an intention to give aid or comfort to the king's enemies, does not amount to an overt act of adhering to the king's enemies; for as the words of this clause are *be adherent*, an actual adherence is necessary to the completion of the offence.

3 Inst. 9; H. P. C. 13, 14; 1 Hawk. P. C. c. 17, § 27. β Nothing will excuse the act of joining an enemy, but the fear of immediate death, nor the fear of any inferior personal injury, nor the apprehension of any loss or outrage upon property. Respublica v. M'Carty, 2 Dall. 87.γ

But if there have been such conspiracy, and aid or comfort be afterwards given, the conspiracy is an overt act in every one of the conspirators of adhering to the king's enemies, inasmuch as there can be no accessory in high treason.

3 Inst. 9, 10, 138; H. P. C. 14; Kel. 19; 1 Hawk. P. C. *ubi supra*.

{Adherence to our own troops, though in consequence of mistaking them for the enemy, is not treason.

1 Dall. 33, Respublica v. Malin.}

(H) Of counterfeiting the Great Seal, Privy Seal, Privy Signet, or Sign Manual.

By the 25 Ed. 3, st. 5, c. 2, it is declared to be high treason, "If a man counterfeit the king's great or privy seal."

||Vide, as to the several seals, 1 Hale P. C. 170; 2 Inst. 556; and, as to great seal of Ireland, 40 G. 3, c. 67, § 3.||

By the 1 Mar. st. 5, c. 6, § 2, it is enacted, "That if any person doth falsely forge or counterfeit the queen's sign manual, or privy signet, every such offence shall be deemed and adjudged high treason."

And by the 7 Ann. c. 21, § 9, it is enacted, "That if any person shall counterfeit her majesty's seals, appointed by the twenty-fourth article of the Union to be kept, used, and continued in Scotland, that the doing thereof shall be construed and adjudged to be high treason."

It is not a counterfeiting within the meaning of any one of these statutes, unless the counterfeit thing resemble the thing counterfeited.

3 Inst. 15; 1 H. H. P. C. 181.

But it is not necessary that there should be an exact resemblance between the thing counterfeited and the counterfeit thing.

A person had counterfeited the privy seal; but, that there might be some differences between the counterfeit and the true privy seal, he had, with design, left out the crown, and he had also left out some letters and inserted others in their stead. This, notwithstanding the differences, was holden to be a counterfeiting of the privy seal.

2 Roll. R. 50, Robinson's case; 1 H. H. P. C. 184. ||Whether the counterfeits were made to resemble the real seal or not, is a question of fact for the jury. Rex v. Walsh, East's P. C. 87.||

It is said that the engraving of a seal which resembles the great seal, without a warrant from the king, does not seem to be a counterfeiting of the great seal, within the meaning of the 25 Ed. 3, st. 5, c. 2, unless an impression of the engraved seal be affixed to some instrument.

1 H. H. P. C. 185.

And Hale, C. J., in speaking of this, mentioned the case of making a tool or instrument for coining money, which, at the time he wrote, was not high treason, unless some counterfeit money had been actually coined therewith.

1 H. H. P. C. 185.

But, as these cases are not similar, the words of the statute being, in the one case, *doth counterfeit the king's great seal*, in the other, *doth counterfeit the king's money*, the case mentioned does not conclude to the point.

It is in one case said, that where a man had affixed an impression of a counterfeit privy seal to a patent, and had afterwards obtained the great seal to be affixed to the patent, and collected money by virtue thereof, this was, upon the whole circumstances of the case, adjudged to be a counterfeiting of the privy seal.

2 Roll. Rep. 50, Robinson's case.

But it seems to be the better opinion, that counterfeiting an impression of any one of the three seals, or the sign manual, is high treason, although no improper use be made of the counterfeit thing.

The statutes which prohibit the counterfeiting of any one of these seals, or the sign manual, are entirely silent as to the use that may be made of the counterfeit thing.

In one book, of the best authority, the counterfeiting of an impression

(I) Of counterfeiting or diminishing the Money current.

of any one of these seals, or the sign manual, is, without saying any thing further, laid down to be high treason.

1 H. H. P. C. 184.

And in the case of counterfeiting the king's money, the counterfeiting has been holden to be high treason, although the counterfeit money were not uttered.

Bro. *Treas.* pl. 27; 3 Inst. 16; 1 H. H. P. C. 214.

It has been holden, that the counterfeiting of a great seal, which has not for some time been made use of, is high treason.

1 H. H. P. C. 177.

At the common law a misuse or an abuse of the great seal was, in some cases, high treason.

If the chancellor had affixed the great seal to an instrument, without the proper warrant for so doing, this would, at the common law, have been high treason; because it was a misuse of the great seal.

3 Inst. 15, 16; H. P. C. 18.

If a man, after stealing or finding the great seal, had affixed it to an instrument, this, it being an abuse of the great seal by a person who never had authority to use it, would, at the common law, have been high treason.

3 Inst. 16.

But neither a misuse nor an abuse of the great seal is, since the 25 Edw. 3, st. 5, c. 2, high treason; because there is not, in either case, a counterfeiting thereof.

3 Inst. 15, 16; H. P. C. 18.

The making of any alteration in, or addition to, what is contained in an instrument, after the great seal has been thereto affixed, is not high treason: because this is only an abuse of the great seal.

3 Inst. 15; Kel. 80; 1 Hawk. P. C. c. 17, § 52.

It is not, for the same reason, high treason to take the wax which has been impressed with the great seal, from one instrument, and affix it to another.

3 Inst. 15, 16; H. P. C. 18; Kel. 80; 1 Hawk. P. C. *ubi suprà*.

An intent, or an attempt, to counterfeit one of the three seals, or the sign manual, is not high treason; for, as the words of the statute are *doth counterfeit*, the offence is not complete unless there be an actual counterfeiting.

3 Inst. 15; 1 Hawk. P. C. *ubi suprà*.

But if any one of these seals or the sign manual has been counterfeited, every person, who was aiding in or consenting to the counterfeiting, is guilty of high treason; inasmuch as there can be no accessory in high treason.

3 Inst. 16, 138; H. P. C. 14, 18; Kel. 10.

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By the 25 Edw. 3, st. 5, c. 2, it is declared to be high treason, "If a man doth counterfeit the king's money."

It is laid down, that the words *the king's money*, in this clause, do only mean such gold and silver coins as are coined within the realm.

2 Inst. 577; 1 Hawk. P. C. c. 17, § 57.

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It seems, from a late transaction, that the counterfeiting of money, after a stop has been put to the currency thereof, is not a counterfeiting within the meaning of this clause.

The currency of the gold coins called *broad pieces*, was put a stop to by a proclamation, bearing date the twenty-first day of February, one thousand seven hundred and thirty-two; and, by the same proclamation, the collectors and receivers of the revenue tax or taxes were commanded to receive such broad pieces, for and during the space of one year from the date thereof, at the rate of four pounds one shilling per ounce troy, in all payments on account of the revenue tax or taxes.

By the 6 Geo. 2, c. 26, which statute was made very soon after this proclamation, it was enacted, "That if any person shall, on or before the twenty-first day of February, one thousand seven hundred and thirty-three, forge or counterfeit any of the gold coins called *broad pieces*, every such offender shall be adjudged guilty of high treason."

This seems to be a legislative declaration that the forging or counterfeiting of the king's money coined within the realm, after a stop is put to the currency thereof, is not high treason within the 25 Edw. 3, st. 5, c. 2; for if it be so, there was no need to make it so in this particular case by an express statute.

A counterfeiting of the king's money in Ireland, or in any other place subject to the British crown, is a counterfeiting within the meaning of the 25 Edw. 3, st. 5, c. 2.

1 Hawk. P. C. c. 17, § 67.

If a person, employed by the king in coining, coin money of less weight than it ought to be, or with more alloy in it than there ought to be, this is a counterfeiting of the king's money within the meaning of the 25 Edw. 3, st. 5, c. 2.

3 Inst. 16, 17; Bro. *Treas.* pl. 19; 1 Hawk. P. C. c. 17, § 55.

By the 1 Mar. st. 2, c. 6, it is enacted, "That if any person or persons shall falsely forge and counterfeit any such coin of gold or silver, as is not the proper coin of this realm, and is or shall be current within this realm, by the consent of the queen, her heirs or successors, every such offence shall be deemed and adjudged high treason."

By a clause in this statute it is expressly enacted, "That the councillors, procurers, aiders, and abettors of the person or persons guilty of the offence thereby made high treason, shall be deemed and adjudged guilty of high treason."

And there is, in all subsequent statutes which make any offence relating to money high treason, a clause to the same effect.

But all these clauses seem to be rather *ex abundanti cautela*, or *in terrorem*, than *ex necessitate*.

It was indeed holden, in one old case, that the receiving and aiding of a man, after he had been guilty of counterfeiting the king's money, is not high treason.

Dyer, 296, Conimer's case, Mich. 12 El.

But it is in divers books laid down, that such receiving and aiding make the person guilty thereof a principal in this, as well as in any other species of high treason.

3 Inst. 138; H. P. C. 127, 215.

And it was resolved at the Old Bailey, by all the judges present, that

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the uttering of counterfeit money by a person who knew the counterfeiter thereof, is high treason ; because it is an aiding after the fact.

Kel. 33, Clark's case, 31 Aug. 16 Car. 2.

By the 5 Eliz. c. 11, § 2, it is enacted, " That from and after the fifth day of May, next coming, clipping, washing, rounding, or filing, for wicked lucre or gain's sake, of any of the proper moneys or coins of this realm, or the dominions thereof, or of the moneys or coins of any other realm, allowed to be current within this realm, or the dominions thereof, at this present ; or that hereafter shall be lawful moneys or coins of this realm, or the dominions thereof, or of any other realm, and by proclamation allowed to be current here by the queen's majesty, her heirs, or successors : shall be taken, deemed, and adjudged, by virtue of this act, to be high treason."

By the 18 Eliz. c. 1, § 1, after reciting that, since the making of the statute of the fifth year of her majesty's reign, divers evil-disposed persons, knowing that the said law ought to be expounded strictly according to the words thereof, and that like offences ought not, by any equity, to receive the like punishments, have devised arts for the diminishing of moneys and coins, to the loss as well of her majesty as of her subjects, it is enacted, " That if any person shall, from and after the fifth day of May next coming, for wicked lucre and gain's sake, by any art, way, or means whatsoever, impair, diminish, falsify, scale, or lighten the proper moneys or coins of this realm, or any the dominion thereof, or the moneys or coins of any other realm, allowed to be current at the time of the offence committed within this realm, or any of the dominions of the same, by the proclamation of the queen's majesty, her heirs or successors ; every such offence shall be taken, adjudged, and deemed to be high treason."

By the 8 and 9 Wm. 3, c. 26, § 7, [made perpetual by 7 Ann. c. 25,] after reciting, that notwithstanding the laws in force against counterfeiting the moneys and coins of this realm, this offence doth daily increase, it is enacted, " That no smith, engraver, founder, or other person or persons whatsoever, (other than and except the persons employed, or to be employed, in or for his majesty's mint or mints, in the Tower of London, or elsewhere, and for the use and service of the said mints only ; or persons lawfully authorized by the Lords Commissioners of the treasury, or Lord High Treasurer, for the time being,) shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending of any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould,^(a) of steel, iron, silver, or other metal or metals, or of spaud, fine founders' earth, sand, or any other materials whatsoever, in or upon which there shall be, or be made or impressed, or which will make or impress the figure, stamp, resemblance, or similitude of both or either of the sides or flats of any gold or silver coin current within this kingdom ; nor shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending of any edger or edging tool, instrument or engine, not of common use in any trade, but contrived for marking of money round the edges with letters, grainings, or other marks or figures resembling those on the edges of money coined in his majesty's mint, nor any press for coinage, nor any cutting engine for cutting round blanks by force of a screw out of flatted bars of gold, silver, or other metal ; nor shall knowingly buy or sell, hide or conceal, or without lawful authority or sufficient excuse for that purpose knowingly have in his, her, or their houses, custody, or possession, any such puncheon, counter-puncheon, matrix, stamp, die, edger, cutting en-

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gine, or other tool or instrument before mentioned; and if any smith, engraver, founder, or other person or persons whatsoever, (other than and except as aforesaid,) shall offend in any of the matters or things as aforesaid, then all and every such offender and offenders shall be, and is and are hereby adjudged to be, guilty of high treason."

[(a) Hugh Lennard was indicted for having in his possession "one mould of lead." As the words "mould or pattern" are omitted in the last clause of this section of the act, it was submitted to the opinion of the judges, first, whether "a mould" is comprised under the general words "other tool or instrument above-mentioned?" And, secondly, if it be so comprised, Whether it should not be described in the indictment as "a tool or instrument" mentioned in the statute? The judges were unanimous, first, That this mould was a tool or instrument mentioned in the former part of the statute, and therefore comprised under the general words. And, secondly, that as it is expressly mentioned by name in the first clause, with respect to the making or mending, it need not be averred to be a tool or instrument so mentioned. 2 Bl. Rep. 809. So also in the same case, whether a mould, having only a resemblance of the coin inverted, was not an instrument which would *make and impress* the resemblance, rather than one on which the *resemblance* was made and impressed, (which was the way it was laid in this indictment,) the statute seeming to distinguish between such as will make or impress the similitude, &c., as a matrix, die, or mould; and such on which the same is made or impressed, as a puncheon, &c. A great majority of the judges thought the indictment good, because the *stamp* of the coin was *certainly* impressed on the mould; but they thought it would have been more accurate, had it charged "a mould that would make and impress the similitude," &c. And in this opinion, some, who otherwise doubted, acquiesced. 2 Bl. Rep. 822. But an instrument which would only impress the figure of only part of one side of the coin, is not within the statute. Ca. temp. Hardw. 371.] ||See *Rex v. Moore*, 2 Car. and P. 235.||

By § 2 it is enacted, "That if any person or persons whatsoever shall, without lawful authority for that purpose, wittingly or knowingly convey, or assist in conveying, out of his majesty's mint in the Tower of London, or out of any other of his majesty's mints, any puncheon, counter-puncheon, matrix, die, stamp, edger, cutting engine, press, or other tool, engine, or instrument used for or about the coining moneys there, or any useful part of such tools or instruments, that then, as well the said person and persons so offending, as also all and every person and persons knowingly receiving, hiding, or concealing the same, shall be, and is and are hereby adjudged to be, guilty of high treason."

By § 3 it is enacted, "That if any person or persons (other than the persons employed in his majesty's mint or mints, or such as shall have authority from the Lords Commissioners of the treasury, or the Lord High Treasurer for the time being,) shall mark on the edges any of the current coin of this kingdom, or if any person or persons whatsoever shall mark on the edges any of the diminished coin of this kingdom, or any counterfeit coin resembling the coin of this kingdom, with letters or grainings, or other marks or figures like unto those on the edges of money coined in his majesty's mint; every such offence shall be, and is hereby adjudged to be, high treason."

By § 4 it is enacted, "That if any person or persons whatsoever shall colour, gild, or case over with gold or silver, or with any wash or materials producing the colour of gold or silver, any coin resembling any of the current coin of this kingdom, or any round blanks of base metal, or of coarse gold or silver, of a fit size and figure to be coined into counterfeit milled-money, resembling any of the gold or silver coin of this kingdom; or if any person or persons shall gild over any silver blanks, of a fit size to be coined into pieces resembling the current gold coin of this kingdom; all and every such person and persons so offending shall be, and is and are hereby adjudged to be, guilty of high treason."

[It has been resolved upon this clause of the statute, that it is immaterial whether

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the colouring be effected immediately by some external and superficial application, or arise latently by extraction from the application of *aqua fortis*, or other chemical power. Rex v. Lacy and Parker, O. B. 6 Dec. 1776; Leach's Hawkins, c. 17.] ¶ And preparing blanks with such materials as, when rubbed with rape, will make them resemble the real coin, is a colouring within the statute, before the resemblance has been actually produced by friction. East, P. C. 165.¶

By the 15 Geo. 2, c. 28, § 1, it is enacted, "That if any person whatsoever shall, after the twenty-ninth day of September, one thousand seven hundred and forty-two, wash, gild, or colour any of the lawful silver coin called a shilling or a sixpence, or any counterfeit or false shilling or sixpence, or add to or alter the impression, or any part of the impression, of either side of such lawful or counterfeit shilling or sixpence, with intent to make such shilling resemble, look like, or pass for a piece of lawful gold coin called a guinea; or with intent to make such sixpence resemble, look like, or pass for a piece of lawful gold coin called a half-guinea; or shall file, or any ways alter, wash, or colour, any of the brass moneys called half-pence or farthings, or add to or alter the impression, or any part of the impression, of either side of a half-penny or farthing, with intent to make a half-penny resemble, look like, or pass for a lawful shilling; or with intent to make a farthing resemble, look like, or pass for a lawful sixpence; the person or persons so offending in any of the matters aforesaid, shall be, and is and are hereby adjudged to be, guilty of high treason."

It seems to have been always the better opinion, that only gold or silver coins are the king's money within the meaning of the 25 Ed. 3, st. 5, c. 2.

2 Inst. 577; 1 Hawk. P. C. c. 17, § 57.

Some doubt seems formerly to have been entertained, whether the counterfeiting of copper money, made current by proclamation, were not high treason.

1 H. H. P. C. 211.

In order to remove all doubt concerning this matter, it is by the 15 Geo. 2, c. 28, § 6, declared, "That the coining or counterfeiting any of the copper money of this kingdom is only a misdemeanor."

¶ This offence is made felony by 11 G. 3, c. 40; and the provisions of these acts are extended to all copper moneys of whatever denomination, by 37 G. 3, c. 126; and vide East, P. C. 162; 2 Russell on Cri. 58, (2d edit.)¶

It has already been observed, that the counterfeiting of the great seal is not high treason, unless the counterfeit seal be like the true great seal.

Antè, (H).

There seems to be equal reason to hold, that the counterfeiting of money is not high treason, unless the counterfeit money be like the true money: for the word *counterfeit* implies a likeness; and if there be not a likeness, there is very little danger of imposition or fraud from the counterfeit money.

It is moreover said in one book, that it is a counterfeiting within the meaning of the 25 Ed. 3, st. 5, c. 2, although the counterfeit money be not exactly like the true money; from whence it may fairly be inferred that a likeness is necessary.

1 H. H. P. C. 215.

And that clause of the 25 Ed. 3, st. 5, c. 2, which makes it high treason to bring counterfeit money into the realm, has it in these words, *counterfeit to the money of England*.

[It has been resolved, that to counterfeit the impression of half-a-guinea

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on a piece of gold previously hammered, not round, and not passable in the condition it was, is not high treason, for the offence is incomplete.

[Varley's case, 2 Bl. Rep. 632.]

|| But it is not necessary that there should be an impression on the counterfeit coin, if it resemble the common worn currency; and the question of similitude is a question of fact for the jury.

Rex v. Welsh, 1 East, P. C. 164.||

The counterfeiting of money is high treason, although the same be not uttered; for neither the 25 Ed. 3, st. 5, c. 2, nor any other of the statutes, make uttering a part of the offence.

Bro. Treas. pl. 27; 3 Inst. 16; 1 H. H. P. C. 214; 1 Hawk. P. C. c. 17, § 55.

The uttering of counterfeit money was heretofore only a misdemeanor, although the person who uttered such money knew it to be counterfeit.

H. P. C. 127; Kel. 33; 1 Hawk. P. C. c. 17, § 56.

But by the 15 Geo. 2, c. 28, this offence is, in some cases, made felony.

|| This statute only applies to gold and silver coin, not to copper: nor is an indictment at *common law* sustained for uttering counterfeit copper money.

Cirwan's case, 1 East, P. C. 182. Vide 5 Evans' Stat. 177, note 1; and see 43 G. 3, c. 139, as to counterfeiting foreign coin of copper, and Russell on Cri. book 2, ch. 1, (2d edit.)

And the mere *possession* of counterfeit money has been held not to be an indictable offence.

The statute, 56 Geo. 3, c. 68, § 17, relating to the new silver coinage, enacts that all former acts in force, respecting the coins of the realm, shall apply to the silver coin to be coined in pursuance of that statute.||

(K) Of bringing counterfeit Money into the Realm.

By the 25 Ed. 3, st. 5, c. 2, it is declared to be high treason, "If a man bring false money into this realm, counterfeit to the money of England as the money called Lushburgh, or other like to the said money of England, knowing the money to be false, to merchandise or make payment, in deceit of our lord the king and of his people."

By the 1 & 2 Ph. & Mar. c. 11, after reciting that many ill-disposed persons have of late brought into this realm, from parts beyond the seas, forged and counterfeit money, like to such coins of gold and silver of other realms, as, by the consent of the king and queen our sovereign lord and lady, are allowed to be current within this realm; and have uttered the same here by merchandising and otherwise; because the said ill-disposed persons have perceived that there is not any sufficient law provided for the condign punishment of offenders in that behalf, it is enacted, "That if any person or persons shall bring from the parts beyond the sea into this realm, or into any of the dominions of the same, any such false and counterfeit coin or money, being current within this realm as is aforesaid, knowing the same coin or money to be false or counterfeit, to the intent to utter or make payment with the same, within this realm or any the dominions of the same, by merchandising or otherwise; that all and every such person or persons so offending shall be deemed and adjudged to be offenders in high treason."

Bringing counterfeit money into the realm is not within the meaning of

(L) Of slaying certain Officers.

these statutes, unless it be like either the money of England, or like such money of other realms as is current within this realm.

But it is not necessary that the counterfeit money should be exactly like the true money.

1 H. H. P. C. 184, 214.

The counterfeit money must, in order to constitute this offence, be brought from a foreign nation, and not from any place subject to the English crown; for although every such place is, to many purposes, distinct from the realm, and consequently a bringing into the realm from such a place would be a bringing into the realm within the letter of the 25 Ed. 3, st. 5, c. 2, or the 1 & 2 Ph. & Mar. c. 11, the construction has been, that the bringing of counterfeit money from Ireland, or any place subject to the English crown, into England, is not such a bringing into the realm as is within the meaning of either of these statutes.

3 Inst. 18; H. P. C. 21; 1 Hawk. P. C. c. 17, § 69.

It is laid down in one book, that the bringing of counterfeit money into the realm from a foreign nation is not high treason; unless there be a merchandising with or a payment of the money.

3 Inst. 18.

In other books it is laid down that, as an actual merchandising with or payment of the money is not made part of the offence by the 25 Ed. 3, st. 5, c. 2, or by the 1 & 2 Ph. & Mar. c. 11, the bringing of counterfeit money into the realm, with an intention to merchandise therewith, or make payment thereof, is high treason; and that the bringing of it in is evidence of such intent.

1 H. H. P. C. 229; 1 Hawk. P. C. c. 17, § 69.

The former, however, seems to be the better opinion.

For, in the 25 Ed. 3, st. 5, c. 2, the words are, *doth bring false money into this realm, counterfeit to the money of England, to merchandise or make payment*; which seem to imply, that there may be a bringing of counterfeit money into the realm without an intention to merchandise or make payment; and, if so, it would be a very hard construction to hold that the bringing in is in itself evidence of such intention.

||Both the stats. 25 Ed. 3, st. 5, c. 2, and 1 & 2 Ph. & M. c. 11, make the offence consist in importing, with *intent* to make payment. It seems, therefore, that the offence may be completed without an actual making payment, and that the existence of the intent may be collected by the jury from *circumstances*.||

And in the 1 & 2 Ph. & Mar. c. 11, *the uttering of counterfeit money*, brought from a foreign realm, *here by merchandising and otherwise*, is recited as part of the mischief which is by that statute intended to be remedied.

The uttering of counterfeit money brought into the realm from a foreign realm is not high treason, unless it be uttered by the person who brought it in; the bringing of it into the realm only being made high treason.

3 Inst. 18; H. P. C. 21; 1 Hawk. P. C. c. 17, § 68. ||Vide 14 G. 3, c. 42; 39 G. 3, c. 75; 37 G. 3, c. 126; East, P. C. ch. 4; 1 Russell on Cri. p. 71, as to provisions respecting the coin not connected with the subject of *treason*.||

(L) Of slaying certain Officers.

By the 25 Ed. 3, st. 5, c. 2, it is declared to be high treason, "If a man slay the chancellor, treasurer, or any justice of our lord the king of the one bench or of the other, a justice in eyre or of assize, and all other jus-

(M) Of extolling or maintaining the Power of the See of Rome.

tices assigned to hear and determine, being in their places doing their offices."

The construction has been, that this clause does not extend to any officers, except those which are therein expressly mentioned.

3 Inst. 18; H. P. C. 17; 1 Hawk. P. C. c. 17, § 47.

It has been holden that the wounding of one of the officers mentioned in this clause, while he is in the execution of his office, is not high treason, unless death ensue.

3 Inst. 18; H. P. C. 17; 1 Hawk. P. C. c. 17, § 47.

By the 7 Ann. c. 21, § 8, it is enacted, "That if any person shall slay any of the lords of the session, or of the lords of justiciary, sitting in judgment in the exercise of their office within Scotland, the doing thereof shall be construed, adjudged, and taken to be high treason."

||By the 9 Ann. c. 16, (made on occasion of Mr. Secretary Harley being stabbed by Guiscard,) it is enacted, "That if any person shall attempt to kill, or unlawfully assault, strike, or wound any privy councillor in the execution of his office, he shall be declared a felon, and suffer death without benefit of clergy."||

(M) Of extolling or maintaining the Power of the See of Rome.

By the 5 Eliz. c. 1, § 2, it is enacted, "That if any person or persons, inhabiting or resident within this realm, or within any other part of the queen's dominions, after the first day of April, one thousand five hundred and sixty-three, shall, by writing, ciphering, printing, preaching, or teaching, advisedly and wittingly extol, maintain, or defend, the authority, jurisdiction, or power of the bishop of Rome, heretofore claimed, used, or usurped within this realm, or in any country under the queen's obeisance; or, by any speech, open deed, or act, advisedly and wittingly attribute any such jurisdiction, authority, or pre-eminence to the said see of Rome, or to any bishop of the same, within this realm, or in any the queen's dominions; that then every such person or persons so offending shall incur the dangers, penalties, pains and forfeiture of the statute of *præmunire*."

And by § 10, it is enacted, "That if any such offender, after such conviction and attainder as is aforesaid, do afterwards commit or do the said offences, or any of them, in manner and form aforesaid, and be thereof duly convicted and attainted, he shall, for the second offence, forfeit and suffer as in cases of high treason."

It has been holden, that if a man write a book in defence of the pope's jurisdiction within this realm, and afterwards publish it, he is liable to the penalties of this statute.

Dyer, 282.

It has been also holden, that if one man, knowing the purport of a book of this kind which was written beyond the seas, bring it over, and secretly sell it, and another, having read or heard the contents thereof, commend it, they are both liable to the penalties of this statute.

Dyer, 282.

But if a man, who has heard the contents of such a book, only buy and read it, he is not liable to the penalties of this statute.

Dyer, 282.

A defendant, who had been convicted of an offence against this statute, and had received judgment for the same, being asked by Manwood, Chief

(N) Of refusing a second Time to take Oath of Supremacy.

Baron, whether he were still of the same opinion? answered, that he was. It was holden, at a meeting of the judges, that by this answer he became guilty of *advisedly and wittingly* maintaining the pope's power a second time. But two of the judges were of opinion that these words, which were spoken in answer to a question put by the Chief Baron, did not amount to a maintaining of the pope's power, *advisedly and wittingly*, a second time.

Sav. 46, Slade's case.

(N) Of refusing a second Time to take the Oath of Supremacy.

By the 1 Eliz. c. 1, § 19, it is enacted, "That every archbishop, bishop, and every other ecclesiastical person, officer, and minister, and every temporal judge, justice, mayor, and every other temporal officer and minister, and every other person receiving your highness's fee or wages within this realm, or any your highness's dominions, shall take the oath of supremacy therein set forth."

By § 20, it is enacted, "That if any such person shall obstinately refuse to take the same, he shall forfeit, during his life, every spiritual promotion, benefice, and office, and every temporal promotion and office, which he hath solely at the time of such refusal."

By the 5 Eliz. c. 1, § 5, it is enacted, "That all persons who shall take holy orders, or who shall be promoted to any degree of learning, in any university within this realm or the dominions to the same belonging; all schoolmasters, or teachers of children; all benchers, readers, utter barristers and ancients, in any house of court; all principal treasurers, and such as be of the grand company of every inn of chancery; all attorneys, prothonotaries, and filasers; all sheriff's escheators, and feodaries: and all other persons which shall take upon them or be admitted to any office in the law; and all officers and ministers of any court whatsoever, and every of them, shall take the oath of supremacy set forth in the 1 Eliz. c. 1, intituled *An act restoring to the crown the ancient jurisdiction over the estate ecclesiastical and spiritual, and abolishing all foreign powers repugnant to the same*, before he shall be admitted to take upon him to use, exercise, supply or occupy any such vocation, office, degree, ministry, room, or service, in the open court whereunto he shall belong; and if he shall not belong to any open court, then in an open place, before a convenient assembly to witness the same, and before such person or persons as shall have authority, by common use or otherwise, to admit such person to such vocation, office, degree, ministry, room, or service; or else before such person or persons as by the queen's highness, her heirs, or successors, by commission under the great seal, shall be named and assigned."

By § 6, it is enacted, "That every archbishop and bishop shall have power to tender the said oath to every spiritual and ecclesiastical person within his diocese."

By § 7, it is enacted, "That the lord chancellor or keeper of the great seal for the time being shall and may, at all times hereafter, direct a commission under the great seal to any person or persons, giving them thereby authority to tender the said oath to such person or persons, as by the said commission the said commissioners shall be authorized to tender the same unto."

By § 8, it is enacted, "That if any person appointed or compellable by this act, or by the act made in the said first year, to take the said oath, to whom the said oath by such commission shall be appointed to be tendered,

(N) Of refusing a second Time to take Oath of Supremacy.

shall, at the time of the said oath so tendered, refuse to take the same, the party so refusing shall incur the dangers, penalties, pains, and forfeitures of the statute of *præmunire*."

And by § 11, it is enacted, "That if any of the said persons do, after the space of three months after the first tender of the said oath, the second time refuse to take the same, in form aforesaid to be tendered, every such offender shall for the same second offence suffer the same pains, judgment, and execution as is used in cases of high treason."

But by § 17, it is provided, "That this act shall not extend to compel any temporal person above the degree of a baron to take the said oath."

And by § 20, it is provided, "That no person shall be compelled, by virtue of this act, to take the said oath, at the second time of tendering the same, except the same person shall be an ecclesiastical person, that shall have charge, cure, or office in the church, or any office or ministry in any ecclesiastical court of this realm; or such person as shall wilfully refuse to observe the orders and rites for divine service that be authorized to be used and observed in the church of England, after that he shall be publicly admonished by the ordinary, or some of his officers for ecclesiastical cases to keep and observe the same; or such person as shall openly and advisedly deprave, by words, writings, or open facts, any of the rites and ceremonies authorized to be used in the church of England; or such person as shall say or hear the private mass prohibited by the laws of this realm."

By the 1 W. & M. st. 1, c. 8, § 2, all former statutes, so far as they concern the oath of supremacy, are repealed, and the said oath is abrogated.

But by § 2, it is enacted, "That all persons (other than such concerning whom provision shall be made in this act, or in any other act of this session of parliament) who shall hereafter be admitted into any office or employment ecclesiastical or civil, or come into any capacity, in respect or by reason whereof they should have been obliged, by any statute, to take the said abrogated oath, shall take the oaths by this act required to be taken, in such manner, at such times, before such persons, and in such courts and places as they ought to have taken the said oath in case the same had not been abrogated; and that every such person, who shall neglect or refuse to take the same, shall incur and be liable to the same penalties, forfeitures, disabilities, and incapacities, as by any such statute were appointed for or upon neglect or refusal to take the said oath."

¶ But see the 31 G. 3, c. 32, and 10 G. 4, c. 7, § 10 & 14.¶

By this statute, every person who was before obliged to take the oath of supremacy, is obliged to take the oaths by this act appointed to be taken; and is, in case of refusal, rendered liable to the same *penalties, forfeitures, disabilities, and incapacities*, as he was before liable to for refusing to take the oath of supremacy.

But as it is not said that he shall suffer the same pains, judgment, and execution, as is used in cases of high treason, which are the words of the 5 Eliz. c. 1, or that he shall suffer as in cases of high treason, which are the words generally made use of in statutes making offences high treason, it may be fairly inferred that the refusing a second time to take the oath of supremacy has not, since the making of the 1 W. & M. st. 8, c. 8, been high treason.

It is moreover provided, by the 5 Eliz. c. 2, § 10, "That this act, or any thing therein contained, or any attainder to be had by virtue of this

(P) Of reconciling any Person, or being reconciled, to the See of Rome.

act, shall not extend to make any corruption of blood, the disinheriting of any heir, forfeiture of dower, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his or their natural lives only."

But there is not such a provision in the 1 W. & M. st. 1, c. 8.

The consequences would be, that, if a second refusal to take the oaths by the latter act required to be taken in lieu of the abrogated oath of supremacy were at this day high treason, the punishment of such offence would be more severe than it was before the making of the 1 W. & M. st. 1, c. 8, which is contrary to the spirit of that statute, and of the time in which it was made.

(O) Of putting a Popish Bull in Ure.

By the 13 Eliz. c. 2, § 3, it is enacted, "That if any person shall obtain, from the Bishop of Rome or any of his successors, any bull, writing, or instrument; or shall publish or put in ure any such bull, writing, or instrument; that every such offence shall be deemed and adjudged to be high treason."

By the same *section* it is enacted, "That the procurors, abettors, and counsellors to the committing of the said offences shall suffer as in cases of high treason."

And by § 4, it is enacted, "That every aider, comforter, or maintainer, of any offender against this act, after the committing of any of the said offences, shall incur the pains and penalties of the statute of *præmunire*."

(P) Of reconciling any Person, or being reconciled, to the See of Rome.

By the 23 Eliz. c. 1, § 1, after reciting, that since the statute made in the thirteenth year of the reign of the queen, for preventing the putting of popish bulls in ure, divers evil-affected persons have practised other means than by bulls to withdraw the queen's subjects from their natural obedience to her majesty, to obey the usurped authority of the see of Rome, it is enacted, "That if any person shall have, or pretend to have, power, or shall by any means put in practice, to absolve, persuade, or withdraw any of the queen's subjects, or any within her realms, from their natural obedience to her majesty; or to withdraw any of them, for that intent, from the religion now established, to the Romish religion; or to move any of them to promise any obedience to any pretended authority of the see of Rome, or of any other prince, state, or potentate, to be had or used within her dominions; or shall do any overt act for that intent or purpose; that then every such person shall suffer as in cases of high treason."

And by the same *section* it is enacted, "That if any person shall, by any means, be willingly absolved or withdrawn as aforesaid, or willingly be reconciled, or shall promise any obedience to such pretended authority, prince, state, or potentate, as is aforesaid, that then every such person shall suffer as in cases of high treason."

By the same *section* it is enacted, "That the procurers and counsellors unto any of these offences shall suffer as in cases of high treason."

And by § 3, it is enacted, "That any person who shall wittingly be aider or maintainer of any person so offending, knowing the same, shall suffer as in cases of misprision of high treason."

(P) Of reconciling any Person, or being reconciled, to the See of Rome.

It had been holden, that the bare pretending to absolve a subject from his natural allegiance, without an actual persuading him to withdraw the same, and that the actual persuading of a subject to withdraw his natural allegiance, without pretending to a power of absolving him, are both high treasons within the meaning of this statute.

Sav. 3, pl. 9, *Campion's case*.

By the 3 Jac. 1, c. 4, § 22, it is enacted, "That if any person shall, either upon the seas or beyond the seas, or in any other place within the dominions of the king's majesty, his heirs or successors, put in practice to absolve, persuade, or withdraw any of the subjects of the king's majesty, or of his heirs and successors, from their natural obedience to his majesty, his heirs or successors; or to reconcile them to the see of Rome; or to move them, or any of them, to promise obedience to any pretended authority of the see of Rome, or to any other prince, state, or potentate; that then every such person shall suffer as in cases of high treason."

And by § 23, it is enacted, "That if any such person as aforesaid shall be, either upon the seas or beyond the seas, or in any other place within the dominions of the king's majesty, his heirs or successors, willingly absolved, or withdrawn, as aforesaid; or willingly reconciled; or shall promise obedience to any such pretended authority, prince, state, or potentate; that every such person shall suffer as in cases of high treason."

But by § 24, it is provided, "That this last clause shall not extend to any person whatsoever, who shall be reconciled to the see of Rome as aforesaid, (for and touching the point of being reconciled only,) that shall return into this realm, and, within six days after such return, before the bishop of the diocese, or two justices of the peace jointly or severally of the county where he shall arrive, submit himself to his majesty and his laws, and take the oath of supremacy set forth by an act made in the first year of the reign of the late Queen Elizabeth, and also the oath of allegiance before set forth in this act."

By the 1 W. & M. st. 1, c. 8, § 2, all statutes, so far as they concern the oath of supremacy, are repealed, and the said oath is abrogated.

A person, who has been reconciled to the see of Rome, is, by the abrogation of the oath of supremacy set forth by the act made in the first year of Queen Elizabeth, prevented from complying literally with the terms of the proviso contained in the 3 Jac. 1, c. 4, § 24.

There could scarce have been a doubt that the taking of the oaths required by the 1 W. & M. c. 8, to be taken in the room of the oaths of supremacy thereby abrogated, would at this day answer every purpose which the taking of the abrogated oath would heretofore have done.

But to remove all possibility of doubt as to this matter, it is, by the 1 W. & M. c. 8, § 5, enacted, "That all persons (other than such concerning whom provision shall be made in this act, or in any other act of this session of parliament) who shall hereafter come into any capacity, in respect or by reason whereof they would have been obliged, by the said statutes, to take the said abrogated oath, shall take the oaths required by this act to be taken, in such manner, at such times, before such persons, and in such places, as they ought to have taken by the said abrogated oath, in case the same had not been abrogated."

[But see st. 31 G. 3, c. 32.] ¶ And 10 G. 4, c. 7, § 10 & 14.]

(Q) Of receiving Popish Orders or Education.

By the 27 Eliz. c. 2, § 3, it is enacted, "That it shall not be lawful for any jesuit, seminary priest, or other priest, deacon, or religious or ecclesiastical person whatsoever, being born within this realm, or any other her highness's dominions, hereafter to be made, ordained, or professed, by any authority or jurisdiction derived, challenged, or pretended, from the see of Rome, by or of what name, title, or degree soever the same shall be called or known, to come into, be, or remain in any part of this realm, or any other her highness's dominions, other than in such special cases, and upon such special occasions only, and for such time only, as is expressed in this act; and if he do, that then every person so offending shall suffer as in cases of high treason."

[See st. 31 G. 3, c. 32, § 4.]

By § 10, it is provided, "That this act shall not extend to any such religious or ecclesiastical person before mentioned as shall, within three days after he shall come into this realm, or any other her highness's dominions, submit himself to some archbishop or bishop of this realm, or to some justice of the peace within the county where he shall arrive and land, and do thereupon truly and sincerely, before the same archbishop, bishop, or justice of the peace, take the oath of supremacy set forth in an act made in the first year of her highness's reign, and by writing under his hand confess and acknowledge, and from thenceforth continue, his due obedience to her majesty's laws, statutes, and ordinances, made or to be made in causes of religion."

It is, however, by § 16, provided, "That if any person, submitting himself as aforesaid, do, at any time within the space of ten years after such submission, come within ten miles of such place where her majesty shall be, without special license from her majesty, in writing under her hand; that then such person shall take no benefit of his said submission, but the same shall be void."

It has been holden, that if a person who comes within the description of this statute, being in a ship with design to go to Ireland, be driven by a storm into England, and immediately apprehended, he is not guilty of high treason; for his design was to go into Ireland; and such person can never be said to come into, be, or remain in England, within the meaning of this statute; because it happened that he was forced into England by the act of God, and was against his will detained there as a prisoner.

Raym. 377, Occallian's case; 1 Hawk. c. 17, § 83.

By the 27 Eliz. c. 2, § 5, it is enacted, "That if any of her majesty's subjects, not being such a religious or ecclesiastical person as is in this act before mentioned, who hereafter shall be of or brought up in any college of jesuits or seminary already erected and ordained, or hereafter to be erected and ordained, in the parts beyond the seas, or out of this realm in any foreign parts, shall not, within six months next after proclamation made in that behalf in the city of London, under the great seal of England, return into this realm, and, within two days next after such return, before the bishop of the diocese, or two justices of the peace of the county where he shall arrive, submit himself to her majesty and her laws, and take the oath of supremacy set forth in an act made in the first year of her reign; that then every such person, who shall otherwise return, come into, or be in this realm, or any other her highness's dominions, for such offence of returning into, or being in the realm, or any other her highness's domi-

(T) Of endeavouring to hinder the Succession to the Crown.

nions, without submission as aforesaid, shall suffer as in cases of high treason."

By the 1 W. & M. st. 1, c. 8, all statutes, so far as they concern the oath of supremacy, are repealed, and the said oath is abrogated.

But, as it has been before observed, in the case of being reconciled to the see of Rome, the taking of the oaths required by the 1 W. & M. st. 1, c. 8, to be taken in lieu of the oaths of supremacy and allegiance thereby abrogated, does at this day answer every purpose which the taking the oath of supremacy would heretofore have done.

¶See 31 G. 3, c. 32, & 10 G. 4, c. 7, § 10 & 14.¶

(R) Of denying the Power of Parliament to limit the Succession of the Crown.

By the 6 Ann. c. 7, § 1, it is enacted, "That if any person or persons shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm that the kings or queens of this realm, with and by the authority of parliament, are not able to make laws and statutes of sufficient force and validity to limit and bind the crown, and the descent, limitation, inheritance, and government thereof; every such person or persons shall suffer as in cases of high treason."

¶To maintain by writing or printing, that the king is not the rightful monarch, or that parliament cannot limit the descent of the crown, is high treason. *Matthews' case*, 9 Sta. Tri. 15.¶

(S) Of affirming that a Person, not in the Succession as by Law established, hath any Right to the Crown.

By 6 Ann. c. 7, § 1, it is enacted, "That if any person or persons shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm that our sovereign lady the queen is not the lawful or rightful queen of these realms; or that the pretended Prince of Wales, who now styles himself King of Great Britain, or King of England, by the name of James the Third, King of Scotland by the name of James the Eighth, hath any right or title to the crown of these realms, or that any other person or persons hath or have any right or title to the same, otherwise than according to an act of parliament made in England in the first year of the reign of their late majesties King William and Queen Mary of ever blessed and glorious memory, intituled *An act declaring the rights and liberties of the subject, and settling the succession of the crown*; and one other act, made in England in the twelfth year of the reign of his said late majesty King William the Third, intituled *An act for the further limitation of the crown, and better securing the rights and liberties of the subject*, and the acts lately made in England and Scotland mutually for the union of the kingdoms; every such person shall suffer as in cases of high treason."

(T) Of endeavouring to hinder the Person next in the Succession as by Law established from succeeding to the Crown.

By the 1 Ann. st. 2, c. 17, § 3, it is enacted, "That if any person or persons shall endeavour to deprive or hinder any person who shall be next in succession to the crown, according to the limitations in an act, intituled *An act declaring the rights and liberties of the subject, and settling the succession of the crown*; and according to one other act, intituled *An act for the further limitation of the crown, and better securing the rights and liberties of the subject*, from succeeding, after the decease of her majesty, to the im-

(X) Of Petit Treason in the general.

perial crown of this realm, and the dominions and territories thereunto belonging, according to the limitations in the before-mentioned acts; and the same maliciously, advisedly, and directly shall attempt, by any overt act or deed, every such offence shall be adjudged high treason."

(U) Of corresponding with the Pretender, or one of his Sons.

By the 13 W. 3, c. 3, it is enacted, "That if any of the subjects of the crown of England shall, within this realm or without, hold, entertain, or keep, any intelligence or correspondence, in person or by letters, messages, or otherwise, with the pretended Prince of Wales, or with any person or persons employed by him, knowing such person to be so employed; or shall, by bill of exchange or otherwise, remit or pay any sum or sums of money for the use or service of the said pretended Prince of Wales, knowing such money to be for such use or service; such person so offending shall be taken, deemed, and adjudged to be guilty of high treason."

¶Vide 39 G. 3, c. 93, repealing the provision of 7 Ann. c. 21, § 10; and 17 G. 2, c. 39, § 3, putting an end to the forfeiture of inheritances on attainder of treason after the death of the Pretender and his sons. Henry Benedict Stuart, Cardinal of York, the last surviving son of James Francis, the "pretended Prince of Wales," and the last descendant of James II., died in 1807, when the family became extinct.¶

By the 17 Geo. 2, c. 39, § 1, after reciting that the eldest son of the Pretender is lately arrived in the French dominions, and hath been received and encouraged by the French king, it is enacted, "That if any of the subjects of the crown of Great Britain shall, within this realm or without, hold, entertain, or keep any intelligence or correspondence, in person, or by letters, messages, or otherwise, with the eldest or any other son or sons of the said Pretender, or with either or any of them, or with any person or persons employed by the said eldest or other son or sons of the said Pretender, or by either or any of them, knowing such person to be so employed; or shall, by bill of exchange or otherwise, remit or pay any sum or sums of money for the use or service of the said eldest or other son or sons of the said Pretender, or of either or any of them, knowing such money to be for such use or service; such person so offending shall be taken, deemed, and adjudged to be guilty of high treason."

(W) Of corresponding or treating with a Rebel or Enemy.

By the 2 & 3 Ann. c. 20, § 34, after reciting, that there is not any effectual provision made for the government of her majesty's land forces out of the realm of England and Ireland, it is enacted, "That if any officer or soldier in her majesty's army shall, either upon land out of England, or upon the sea, hold correspondence with any rebel or enemy of her majesty, or give them advice or intelligence, either by letters, messages, signs, or tokens, or in any way whatsoever, or shall treat with such rebels or enemies, or enter into any condition with them, without her majesty's license, or license of the general, lieutenant-general, or chief-commander; that then every person so offending shall suffer as in cases of high treason."

(X) Of Petit Treason in the general.

DIVERS offences were heretofore petit treason which are not so at this day; as, piracy by a subject; a discovery of the king's counsel by one of the grand jurors; an attempt by a wife to kill her husband.

3 Inst. 20; 1 Hawk. P. C. c. 32. ¶In the United States the crime of petit treason

(X) Of Petit Treason in the general.

does not exist: offenders who are guilty of what is so denominated in England, are punished in the same way as if the offence had been committed against a stranger.

By the 25 Ed. 3, st. 5, c. 2, after declaring the slaying of a master by his servant, the slaying of a husband by his wife, and the slaying of a prelate by an ecclesiastic who oweth faith and obedience to the prelate, to be treasons, it is declared, "That because many other cases of the like treason may happen in time to come, which a man cannot think of or declare at present; if any other case, supposed to be treason, which is not specified above, doth hereafter happen before any one of the justices, such justice shall not proceed to judgment of treason, until the case be laid before the king in parliament, and it is declared whether it ought to be adjudged a treason or other felony."

It does not appear that any offence was, in consequence of the power given by this clause, declared in parliament to be petit treason.

And by the 1 Mar. st. 1, c. 1, § 3, it is enacted, "That no act or offence shall be taken, had, deemed or adjudged to be petit treason, but only such as be declared and expressed to be petit treason in or by the act of parliament made in the twenty-fifth year of the reign of the most noble king of famous memory, Edward the Third, touching or concerning treasons or the declarations of treasons."

As no offence has been, by any statute subsequent to the 1 Mar. st. 1, c. 1, made petit treason, it follows, that no offence is, at this day, petit treason, unless it be one of those which are by the 25 Ed. 3, st. 5, c. 2, declared to be so.

No offence is to be adjudged petit treason, unless it be clearly and without argument or inference within the meaning of the 25 Ed. 3, st. 5, c. 2; for a statute declaring an offence to be treason ought not to be extended by equity.

Plowd. 86; 3 Inst. 12, 81; 18 Eliz. c. 1, § 1.

As petit treason implies murder, it follows that, if the killing of a master, husband, or prelate be not attended with such circumstances as would have made it murder in the case of killing any other person, the offence is not petit treason.

H. P. C. 24; 1 Hawk. P. C. c. 32, § 6.

If, upon an indictment for petit treason, the killing appear to have been upon such sudden provocation, that the offence would, in case the killing had been by a stranger to the person killed, have amounted only to manslaughter, the jury may find the offender guilty of manslaughter only.

1 H. H. P. C. 378.

There may be an accessory, either before or after the fact, in petit treason.

3 Inst. 20, 21, 138.

At the common law, an accessory to petit treason, either before or after the fact, was entitled to the benefit of the clergy.

But by the 4 & 5 Phil. & Mar. c. 4, § 1, the benefit of the clergy is taken away from an accessory before the fact, it being thereby enacted, "That if any person shall maliciously command, hire, or counsel any person to commit any petit treason, every such offender shall not have the benefit of clergy."

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(Y) Of slaying a Husband by his Wife.

The distinction of high and petit treason did never exist in the law of Scotland; for every offence which was by the law of England petit treason, was by the law of Scotland treason.

At this day, an offence which is in England petit treason, is in Scotland only a capital offence; it being, by the 7 Ann. c. 21, § 7, enacted, "That murder under trust, which was, by the law of Scotland, treason, shall, for the time to come, be only adjudged and deemed to be a capital offence."

(Y) Of slaying a Husband by his Wife.

It is, by the 25 Ed. 3; st. 5, c. 2, declared to be petit treason "when a wife slayeth her husband."

If A, who is married to B, do, during the life of B, marry C, the latter woman, although she be, to some purposes, a wife *de facto*, yet she is not a wife within the meaning of this statute; because the second marriage was *ipso facto* void.

1 H. H. P. C. 381.

If a woman, after having been divorced *causâ adulterii vel sævitiae*, murder the man from whom she is divorced, this is petit treason; for, as a divorce for either of these causes does not dissolve the marriage, she continues to be a wife.

1 H. H. P. C. 381.

But a woman, who has been divorced *causâ consanguinitatis vel præcontractûs*, cannot be guilty of petit treason; because the marriage is dissolved by a divorce for either of these causes.

1 H. H. P. C. 381.

If a wife and a stranger are both principals in the murder of her husband, the wife is guilty of petit treason; but the stranger is only guilty of murder.

3 Inst. 20; H. P. C. 25; 1 Hawk. P. C. c. 32.

If a wife, who has procured a stranger to murder her husband, be by agreement with the stranger in the house wherein the murder is committed, the wife, although she were not in the room at the time of committing it, is guilty of petit treason: for, as the stranger is in such case encouraged, by the expectation of having her immediate assistance, in case the same should be wanted, to commit the murder, she is, in judgment of law, as much a principal as if she stood by with a weapon in her hand ready to assist.

Moor, 91; H. P. C. 25; 1 Hawk. P. C. c. 32.

If a wife have procured a servant to murder his master, she, although the fact be perpetrated in her absence, is an accessory to petit treason.

3 Inst. 20; H. P. C. 25; 1 Hawk. P. C. c. 32.

But if a wife, who has procured a stranger to murder her husband, be absent when the fact is perpetrated, she is only an accessory to murder: for the principal is only guilty of murder: and the maxim is, that *accessorius sequitur naturam sui principalis*.

3 Inst. 20, 139; H. P. C. 24, 25; 1 H. H. P. C. 379; 1 Hawk. P. C. c. 32.

If a wife murder her husband by the procurement of a stranger, the stranger is an accessory to petit treason.

1 Hawk. P. C. c. 32.

(Z) Of slaying a Master by his Servant.

By the 25 Ed. 3, st. 5, c. 2, it is declared to be petit treason "when a servant slayeth his master."

The murder of his mistress, or of his master's wife, by a servant, has been adjudged petit treason: for, although neither of these cases is within the letter of the statute, both of them are clearly within the meaning thereof; inasmuch as the word master signifies any person to whom another stands related as servant.

3 Inst. 20; Plow. 86; 1 Hawk. P. C. c. 32.

If a child murder his father or mother, this, although it be a much more heinous offence, is not petit treason; because it is not a case provided against by this clause; and the judges are restrained by another clause in the 25 Ed. 3, st. 5, c. 2, from interpreting this statute *a simili*, or *a minore ad majus*.

Plow. 86; 3 Inst. 20, 22, 23; H. P. C. 24; 1 Hawk. P. C. c. 32.

But if a child who serves his father or mother for meat, drink, clothes, or wages, murder his father or mother, this is petit treason; for such child is to be considered as a servant.

3 Inst. 20; H. P. C. 24; 1 Hawk. P. C. c. 32.

|| Though the indictment in such case may be for murder, it is considered most proper to prefer an indictment for petit treason, because the judgment is different, and because a person indicted for petit treason is entitled to a peremptory challenge of thirty-five. And this doctrine was acted upon by Lawrence, J., in a case of the murder of a woman by her sister, who acted as her servant.

Fost. 104, 328; 1 Russ. on Cri. 482, (2d ed.)||

A servant, after having quitted his service a year, murdered the person who had been his master. This was adjudged to be petit treason, because it appeared that the murder was in consequence of malice conceived against the master, while the servant was in his service.

Bro. Coron. 116; Plow. 206; 3 Inst. 20; H. P. C. 23; 1 Hawk. P. C. c. 32.

It has been already shown, in treating of that species of petit treason which consists in the slaying of a husband by his wife, in what cases the wife is a principal in, or an accessory to, petit treason; or a principal in, or an accessory to, murder. It is in this place, therefore, sufficient to say, without repeating what is there said, that any circumstance which would, in the case of slaying a husband by his wife, have made her so, does, in the case of slaying a master by his servant, make the servant a principal in, or an accessory to, petit treason, or a principal in, or an accessory to, murder.

(Aa) Of slaying a Prelate by an Ecclesiastic who oweth Faith and Obedience to the Prelate.

By the 25 Ed. 3, st. 4, c. 2, it is declared to be petit treason "when a man, secular or religious, slayeth his prelate, to whom he oweth faith and obedience."

If an ecclesiastic, who enjoys a benefice in the diocese of A, within the province of B, murder the archbishop of the province of B, this, although the archbishop be not the immediate superior of such ecclesiastic, seems to be petit treason.

1 H. H. P. C. 381.

(Bb) Of the Indictment of Treason.

If an ecclesiastic hold two benefices in two dioceses, it is petit treason to murder the bishop of either diocese; because a canonical obedience is due to the bishops of both dioceses.

1 H. H. P. C. 381.

It is laid down that, if an ecclesiastic slay the bishop who ordained him, this is petit treason, although he do not enjoy a benefice or cure of souls within the diocese of such bishop; because he promised, at his ordination, a canonical obedience to him.

1 H. H. P. C. 381.

It has been already shown, in treating of that species of petit treason which consists in the slaying of a husband by his wife, in what cases the wife is a principal in, or an accessory to, petit treason, or a principal in, or an accessory to, murder. It is in this place, therefore, sufficient to say, without repeating what is there said, that any circumstance which would, in the case of slaying a husband by his wife, have made her so, does, in the case of slaying a prelate by an ecclesiastic who owes faith and obedience to him, make the ecclesiastic a principal in, or an accessory to, petit treason, or a principal in, or an accessory to, murder.

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It is in the general true, that grand jurors can only inquire of such offences as arise within the county for which they are returned.

H. P. C. 204.

But by the 28 H. 8, c. 15, § 1, it is enacted, "That all treasons, hereafter to be committed in or upon the sea, or in any place where the admiral or admirals have or pretend to have jurisdiction, shall be inquired of in such shires and places in the realm as shall be limited by the king's commission to be directed for the same, in like form and condition as if any such offence had been committed in or upon the land."

At the common law, treason committed out of the realm could only be inquired of in the county where the offender had land.

H. P. C. 15, 203.

But by the 35 H. 8, c. 2, § 1, it is enacted, "That all treasons hereafter committed by any person or persons out of this realm of England shall be from henceforth inquired of before the king's justices of his bench for pleas to be holden before himself, by good and lawful men of the same shire where the said bench shall sit; or else before such commissioners, and in such shire of the realm, as shall be assigned by the king's majesty's commission, and by good and lawful men of the same shire; in like manner and form, to all intents and purposes, as if such treasons had been committed within the same shire where they shall be so inquired of."

The construction seems to have been, that this act extends only to such offences as were, at the time of making it, treason; for in divers subsequent statutes, by which other offences are made treasons, there is a provision for the case of their having been committed out of the realm.

By the 13 W. 3, c. 3, § 43, it is enacted, "That where any of the offences *by this statute made high treasons* shall be committed out of this realm, the same may be inquired of in any county of this kingdom of England."

By the 2 and 3 Ann. c. 20, § 36, it is enacted, "That all the offences *by this statute, made high treasons*, which shall be committed upon land

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out of England, or upon the sea, may be inquired of in the Court of Queen's Bench, by good and lawful men of the same county where the said court shall sit; or before such commissioners, and in such county of this realm, as shall be assigned by the queen's majesty, and by good and lawful men of the same county; in manner and form, to all intents and purposes, as if the said treasons had been committed within the same county."

By the 7 Ann. c. 21, § 5, it is enacted, "That all treasons which, after the first day of July, one thousand seven hundred and nine, shall be committed by any native of Scotland upon the high sea, or in any place out of this realm of Great Britain, shall be inquired of in such shire, stewarty, or county of Great Britain, as shall be assigned by the queen's commission, in like manner as if such treasons had been committed in the same shire where they shall be inquired of as aforesaid."

By the 17 Geo. 2, c. 39, § 4, it is enacted, "That where any of the offences *by this statute made high treasons* shall be committed out of this realm, the same may be alleged, laid, and inquired of in any county of that part of Great Britain called England, or in any shire or stewarty in that part of Great Britain called Scotland."

By the 7 W. 3, c. 3, § 6, it is enacted, "That no person or persons shall be indicted or prosecuted for any high treason, whereby any corruption of blood may be made, that shall be committed or done within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, unless the indictment be found within three years next after the treason done or committed."

But by § 7, it is provided, "That if any person or persons shall be guilty of designing, endeavouring, or attempting any assassination of the king, by poison or otherwise, such person or persons may be prosecuted at any time, notwithstanding the aforesaid limitation."

By the 8 and 9 W. 3, c. 26, § 9, it is enacted, "That no prosecution shall be, for any offence against this act, *which was made for better preventing the counterfeiting of the current coin of this kingdom*, unless such prosecution be commenced within three months after such offence committed."

¶The information and proceeding before a magistrate are a sufficient commencement of a prosecution within this clause. *Rex v. Wallace, East, P. C. 186.*¶

But by the 7 Ann. c. 25, § 2, it is enacted, "That the prosecution of such person or persons as offend against the statute made in the eighth and ninth years of his late majesty's reign, intituled *An act for better preventing the counterfeiting of the current coin of this kingdom*, by making or mending, or beginning to make or mend, any coining tool or instrument therein prohibited; or by marking money round the edges with letters or grainings; may be commenced at any time within six months after such offence committed; any thing in the said act to the contrary notwithstanding."

By the 1 Ed. 6, c. 12, § 22, it is enacted, "That no person or persons shall be indicted, arraigned, or condemned, for any offence of treason; unless the same offender be accused by two sufficient and lawful witnesses; or shall willingly without violence confess the same."

And by the 5 Ed. 6, c. 11, § 12, it is enacted, "That no person or persons, after the first day of June next coming, shall be indicted for any treasons that now be or hereafter shall be, which shall be perpetrated, committed, or done, unless the same offender or offenders be thereof accused by two lawful accusers."

(Bb) Of the Indictment of Treason.

Some judges have been of opinion, that both these statutes are virtually repealed by the 1 and 2 Ph. & M. c. 10, it being thereby enacted, "That all trials hereafter to be had, awarded, or made, for any treason, shall be had and used according to the course of the common law of this realm, and not otherwise."

3 Inst. 26; Kel. 26.

But Coke, C. J., was of opinion, that the latter statute relates only to the trial of treason, and not to the finding of an indictment for treason.

3 Inst. 25, 26.

This opinion was in part founded on the two following reasons, which seem to be conclusive:—

The word *awarded*, used in the 1 and 2 Ph. & M. c. 10, is only applicable to a trial; for an indictment cannot with any degree of propriety be said to be awarded.

3 Inst. 27.

If the indictment had ever been considered as part of the trial, it must, as that statute directs that every peer of the realm shall be tried by his peers, in the case of a peer of the realm always have been found by peers: but the practice has been constantly otherwise.

3 Inst. 26.

It may be inferred, from a clause in the 1 & 2 Ph. & M. c. 10, by which one witness is declared to be sufficient for the finding of a bill of indictment for some high treason particularly mentioned, that two are necessary for the finding of a bill for any other high treason.

3 Inst. 25, 26.

By the 7 W. 3, c. 3, § 2, it is enacted, "That no person shall be indicted of high treason, whereby any corruption of blood may be made, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason; any law, statute, or usage to the contrary notwithstanding."

But by § 13, it is provided, "That this act shall not extend to any indictment for counterfeiting his majesty's coin, or his great seal, privy seal, privy signet, or sign manual," and consequently one witness is sufficient for the finding of an indictment for one of these offences.

In an indictment for an offence declared to be treason by the 25 Ed. 3, st. 5, c. 2, the treason must be charged in the very words of that statute.

Cro. Car. 125, Pine's case.

Nay, so strict has been the adherence to the words of this statute, that where the king had been actually killed, the killing was not laid as the treason: but the compassing of his death was laid as the treason, and the killing as an overt act.

Kel. 8, The case of the Regicides; 1 Hawk. P. C. c. 17, § 8.

Every high treason must be laid to have been committed *proditoriè*.

Carth. 319, Tucker's case; 3 Inst. 15; H. P. C. 11; Salk. 633; 21 East, P. C. 115; 2 Hale, 172, 184; 2 Salk. 683; 4 Harg. St. Tr. 701; 2 Ld. Raym. 870; 2 Chit. Cr. Law, 104, note (b); Comb. 259.

It has been said, that it is not necessary, in an indictment for high treason, to charge an overt act in any other species of treason except that of compassing or imagining the king's death.

5 Sta. Tri. 24, Vaughan's case.

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But the better opinion is, that as the words in the 25 Ed. 3, st. 5, c. 2, *and thereof be provably attainted of overt act*, do as well relate to the high treason of violating certain personages, to that of levying war against the king, and to that of adhering to the king's enemies, as to that of compassing or imagining the king's death, an overt act must in every one of these treasons be laid.

3 Inst. 14; H. P. C. 13; 1 Hawk. P. C. c. 17, § 29; Salk. 634; 5 Sta. Tri. 21, 22. || And see 36 G. 3, c. 7, (made perpetual by 57 G. 3, c. 6,) and the indictments founded on that statute, *Rex v. Despard*, Sta. Tri. vol. xxviii. p. 362; *Rex v. Watson*, Ibid., vol. xxxii. p. 1; *Rex v. Thistlewood*, Ibid., vol. xxxiii. p. 702.||

It is not necessary, that an overt act be laid to have been done *prodi-toriè*; because the overt act is not laid as the treason, but as the evidence thereof.

Salk. 633, Cranburn's case.

It is sufficient to lay a consultation to kill the king as an overt act of compassing or imagining his death, without laying the manner in which the king's death was to have been brought about; for the consultation is in itself an overt act.

4 Sta. Tri. 710, 711, Lowick's case; Kel. 15.

It must be shown in an indictment for adhering to the king's enemies, to whom and at what time the adherence was, that the court may judge whether the persons alleged to have been adhered to were, at the time of adhering, enemies of the king.

2 Ventr. 316, Harding's case.

But it is not necessary to allege in such indictment, that the adhering was against the king; for this shall be intended.

5 Sta. Tri. 36, Vaughan's case; 1 Hawk. P. C. c. 17, § 28.

In an indictment, wherein the overt act laid is the speaking of treasonable words, it must be alleged, that the words spoken related to the king.

2 Show. 411, || *Rex v. Rosewell*. See S. C. fully reported, 10 Sta. Tri. (8vo ed.;) and see 3 Mod. 52. ¶ In order to render words criminal, as a misprision of treason, they must be spoken with a mischievous and malicious intention. *Respublica v. Wiede*, 2 Dall. 91. § A motion was made in arrest of judgment after a conviction, on the ground that the words were not alleged to be spoken *of the king*. Shower states that the court inclined to the prisoner, but took time to consider, and he was afterwards pardoned. According to Burnet, Hist. vol. i. p. 597, he was not pardoned, but the attorney-general consented to arrest the judgment. But Burnet's account is, in several points, evidently inaccurate. See remarks on the case by North in his Life of the Lord Keeper, vol. ii. p. 107, (ed. 1808.) Whatever doubts may have been formerly entertained, or however the law may have been stretched in arbitrary times, to reach particular men, it is now settled that bare words, not relative to any act or design, however wicked, indecent, or reprehensible they may be, are not overt acts of high treason, but only a misprision, punishable at common law by fine and imprisonment, or other corporal punishment. See East's P. C. vol. i. p. 117, and authorities there cited; and Pine's case, Cro. Car. 117; 3 Sta. Tri. 359. Seditious words may, however, be given in evidence to show *quo animo* the prisoner's acts were done, though not stated as overt acts in the indictment. *Rex v. Watson*, 2 Stark. Ca. 102.||

It was holden by all the judges, that it must be shown in an indictment for coining, that the person indicted was not within any of the exceptions mentioned in the enacting clause of the statute made in the eighth and ninth years of the reign of William the Third, intituled *An act for better preventing the counterfeiting of the current coin of this kingdom*; and the judgment was arrested because this was not shown.

MS. Rep. Anon., Hil. 13 W. 3.

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But it was in this case holden, that another indictment would lie ; and the party, in whose favour the judgment had been arrested, was afterwards convicted upon another indictment, and executed.

MS. Rep. Anon., Hil. 13 W. 3.

It need not be alleged, in an indictment for receiving popish orders, in what place the person indicted was born ; or in what place he was ordained : it being sufficient to allege, in the words of the statute by which this offence is made high treason, *that such person was born in this realm, or in the king's dominions ; and was made, ordained, or professed, by an authority or jurisdiction derived, challenged, or pretended, from the see of Rome.*

1 Hawk. P. C. c. 17, § 82.

It has been said that, as every overt act of compassing the king's death is transitory, an overt act of this species of high treason need not be laid in the county wherein the treason is charged to have been committed.

Kel. 15, The case of the Regicides.

But it seems to be the better opinion, that an overt act, as well of this species of high treason as of every other, must be laid in the county wherein the treason is charged to have been committed ; and that no evidence can be given of an overt act in any other county, until the overt act, laid in the county wherein the treason is charged to have been committed, has been proved.

6 Sta. Tri. 319, Layer's case ; Fost. 10 ; {1 Dall. 33, Respublica v. Malin.}

In an indictment, whether it be against a natural-born subject or an alien, for an offence declared to be high treason by the 25 Ed. 3, st. 5, c. 2, it must be expressly alleged, that the offence was *contra ligeantiae suae debitum* ; for as this statute does not make any offence high treason, it being only declaratory of what offences were so at the common law, every offence, thereby declared to be high treason, continues to be, as it was at the common law, an offence against that allegiance which is due to the king from every person who lives under his protection.

Carth. 318, Tucker's case ; Salk. 631, S. C. ; Ld. Raym. 1, S. C.

But it is not necessary to allege, in an indictment for an offence made high treason by a statute subsequent to the 25 Ed. 3, st. 5, c. 2, that the offence was *contra ligeantiae suae debitum* ; it being sufficient to allege that the offence was *contra formam statuti*.

Salk. 631, Tucker's case.

It is said to be the better opinion, that it is not necessary to allege, in any indictment for high treason, that the offence was *contra naturalem suum dominum*, or *contra naturalis suae ligeantiae debitum* ; and it is added, that it is the safer way, even in an indictment against a natural-born subject, to allege that the offence was *contra ligeantiae suae debitum*.

Fost. 186.

If it be alleged, in an indictment against an alien for high treason, that the offence was *contra naturalem suum dominum*, or *contra naturalis ligeantiae suae debitum*, the indictment is bad : for although a local allegiance be due from an alien to the prince under whose protection he lives, a natural allegiance is not due from him.

7 Rep. 7, Calvin's case ; 4 Sta. Tri. 688 ; ||*sed* vide Foster, 187.||

By the 7 W. 3, c. 3, § 9, it is enacted, " That no indictment for high

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treason, whereby corruption of blood may be made, nor any process or return thereupon, shall be quashed on the motion of the prisoner or his counsel, for mis-writing, mis-spelling, or false or improper Latin, unless exception concerning the same shall be made, in the court where such indictment shall be tried, by the prisoner or his counsel assigned before any evidence is given in open court upon the indictment."

The construction hath been, that exceptions grounded on the errors mentioned in this statute must be taken before plea pleaded; and in Vaughan's case, in Sullivan's case, and in Layer's case, the court refused to hear such exceptions after pleading. It is true that in Cranburn's case, the court did permit such exceptions to be taken after pleading, and in Rookwood's after the jury were sworn; but it ought to be remembered, that these were indulgences to the prisoners upon a new statute, and before the practice was settled to the contrary, as it now is.

Fost. 231.

By the 7 Ann. c. 21, § 1, and § 3, it is enacted, "That all high treasons, hereafter committed within Scotland, shall be inquired of in Scotland in such manner as is used in England."

If a wife join with a stranger in murdering her husband, they may both be indicted in the same indictment: for as the charge in the indictment is, that *felonicè, proditoriè, et ex malitiâ præcogitatâ murdraverunt*, the indictment is good as to both, *reddendo singula singulis*; and consequently the wife may be found guilty of petit treason, and the stranger of murder.

Fost. 329.

β In an indictment for treason, it is sufficient to lay that the defendant sent intelligence to the enemy, without setting forth the particular letter or its contents.

Respublica v. Carlisle, 1 Dall. 35.γ

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At the common law, courts of admiralty claimed an exclusive jurisdiction of all offences committed in or upon the sea.

3 Inst. 11. β For the jurisdiction of the courts in cases of treason, see *Courts of the United States.γ*

But by the 28 H. 8, c. 15, § 1, it is enacted, "That all treasons hereafter to be committed in or upon the sea, or in any place where the admiral or admirals have or pretend to have jurisdiction, shall be heard and determined in such shires and places in the realm as shall be limited by the king's commission, to be directed for the same in like form and condition as if any such offence had been committed or done in or upon the land."

At the common law, high treason committed out of the realm could only be tried in the county wherein the offender had land.

H. P. C. 15, 203. .

The clauses of the different statutes by which it is enacted that high treason committed out of the realm may be inquired of in any English or Scotch county, have been already mentioned.

It is sufficient to say in this place, without repeating those clauses, that in every one of them it is enacted, that high treasons committed out of the realm may be heard and determined in the county wherein it may be inquired of.

By the 33 H. 8, c. 23, § 1, it is enacted, "That if any person or per-

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sons, being examined by the king's council, or three of them, upon any manner of treason, do confess any such offence, or the said council, or three of them, upon such examination shall think any person so examined to be vehemently suspected of any treason; that then in every such case, by the king's commandment, his majesty's commission of *oyer* and *terminer* shall be made to such persons, and into such shires and places as shall be named and appointed by the king's highness, for the speedy trial, conviction, or delivery of such offenders."

This statute is virtually repealed by the 1 & 2 Ph. & M. c. 10, by which it is enacted, "That all trials of treason shall be according to the course of the common law of this realm, and not otherwise."

3 Inst. 27.

If a bill of indictment of high treason have been found in the county wherein the offence was committed, it may be removed into the Court of King's Bench, and the offender may be tried there.

Dyer, 286.

The person indicted of high treason in the proper county may be tried in a foreign county, before commissioners appointed by a special commission; for this is warranted by the course of the common law.

3 Inst. 27.

But the jurors must, in such case, be of the county wherein the offence was committed; because this is required by the common law.

3 Inst. 27; H. P. C. 234.

If a man be indicted of high treason, he may, at this day, as he might have done at the common law, plead a foreign plea and be tried in a foreign county; but a foreign plea cannot be pleaded to an indictment for petit treason.

3 Inst. 27.

By the 7 W. 3, c. 3, § 1, it is enacted, "That every person that shall be indicted for high treason, whereby any corruption of blood may be made, shall have a true copy of the whole indictment, but not the names of the witnesses, delivered to him five days at the least before he shall be tried for the same, whereby to enable him to advise with counsel thereupon, to plead and make his defence, his attorney or agent requiring the same, and paying the officer his reasonable fee for writing thereof, not exceeding five shillings for the copy of such indictment."

It was holden at a meeting of the judges, on the 12th day of January, one thousand seven hundred and seven, to consider of some things relative to the intended trial of Gregg, that it is the safer way to deliver a copy of the caption, as well as of the body of an indictment for high treason; and that the five days ought to be exclusive both of the day of delivery and the day of trial.

MS. Rep. Gregg's case; {2 Dall. 335, United States v. Pennsylvania Insurgents. See 1 Dall. 33, Respublica v. Molder.}

As the intention of this clause, in granting a copy of an indictment for high treason, is merely for the sake of enabling the person indicted to plead, it has been holden that no person, after having pleaded to an indictment, is entitled to have a copy thereof.

Salk. 153, 634.

No exception can be taken to the fulness of the copy of an indictment

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for high treason which has been delivered, after the indictment has been pleaded to.

4 Sta. Tri. 646, Rookwood's case.

By 7 W. 3, c. 3, § 1, it is enacted, "That every person that shall be indicted, arraigned, or tried for high treason, whereby any corruption of blood may be made, shall be admitted to make his full defence by counsel learned in the law; and in case any person so indicted shall desire counsel, the court before whom such person shall be tried, or some judge of that court, shall and is hereby authorized and required, immediately upon his request, to assign to such person such counsel, not exceeding two, as the person shall desire, to whom such counsel shall have free access at all reasonable hours; any law or usage to the contrary notwithstanding."

By § 12, it is provided, "That neither this act, nor any thing therein contained, shall any ways extend to any impeachment or other proceeding in parliament, in any kind whatsoever."

But by 20 Geo. 2, c. 30, it is enacted, "That every person who shall be impeached by the Commons of Great Britain of any high treason, whereby any corruption of blood may be made, shall be received and admitted to make his full defence by counsel learned in the law, not exceeding two counsel, who shall be assigned for that purpose, on the application of the party impeached, at any time after the articles of impeachment shall be exhibited by the Commons."

By the 7 W. 3, c. 3, § 7, it is enacted, "That every person who shall be indicted for high treason, whereby any corruption of blood may be made, shall have a copy of the panel of the jurors who are to try him duly returned by the sheriff, and delivered unto him two days at the least before he shall be tried."

But by § 13, it is provided, "That this act, or any thing therein contained, shall not extend to any proceedings upon an indictment for counterfeiting his majesty's coin, his great seal, or privy seal, his privy signet, or sign manual."

[Vide Dougl. 590.]

By the 7 Ann. c. 21, § 11, it is enacted, "That from and after the decease of the person who pretended to be Prince of Wales during the life of the late King James, and since pretends to be King of Great Britain, and at the end of three years after the succession to the crown upon the demise of her majesty shall take effect, as the same is and stands limited, by an act made in the first year of the reign of their late majesties King William and Queen Mary, intituled *An act for declaring the rights and liberties of the subject and settling the succession of the crown*, and by one other act, made in the twelfth year of the reign of his late majesty King William the Third, intituled *An act for the further limitation of the crown, and better securing the rights and liberties of the subject*, when any person is indicted for high treason, a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, profession, and place of abode (a) of the said witnesses and jurors, be given at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted ten days before the trial, and in the presence of two or more credible witnesses; any law or statute to the contrary notwithstanding."

¶ These additional privileges were first exercised on the trial of Lord George Gordon

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in 1781. Doug. R. 592. (a) A description of a witness as *late* of a certain place is not sufficient, if it appear that he has had a different and later residence. R. v. Watson, 2 Stark. N. P. C. 116. The objection of misdescription must be taken before the witness is examined. Ibid. 158.¶

¶By necessary construction, the ten days mentioned in the statute of Anne must be reckoned after the bill is found, and before the arraignment; for till the bill is found there is no indictment, and on the arraignment the prisoner pleads *instante*. The ten days must, in the instance of the copy of the indictment, be reckoned exclusive of the day of delivery and of trial, and by general practice it is reckoned exclusive of Sunday.

East, P. C. 112, and cases there cited. Vide Ibid., as to the course of proceedings on the trials of Lord George Gordon, Hardy, &c.¶

By the 7 Ann. c. 21, § 1 & 3, it is enacted, "That all high treasons hereafter committed within Scotland shall be heard and determined in Scotland, in such manner as is used in England."

¶By statute of 39 & 40 G. 3, c. 93, (passed soon after the trial of Hadfield, for an attempt on the life of his majesty George III.) it is enacted, "That in all cases of high treason, in compassing the death of the king, and of misprision of such treason, where the overt acts shall be the assassination of the king, or an attempt against his life or person, the person charged shall be indicted, arraigned, tried, and attainted in the same manner in every respect as if he stood charged with murder; and the provisions of the 7 W. 3, c. 3, and 7 Ann. c. 21, shall not extend to such cases."¶

If a person arraigned upon an indictment for high treason stood mute, his guilt was to be taken *pro confesso*; and the same judgment was always to be given as if he had been convicted.

3 Inst. 14; Sty. 104.

And, since the 12 G. 3, c. 20, standing mute amounts in the case of petit treason to a confession of guilt.

By the 33 H. 8, c. 23, § 3, it is enacted, "That peremptory challenges shall not from henceforth be admitted or allowed in any case of high treason."

But it being by the 2 Ph. & M. c. 10, enacted, "That all trials of treasons shall be according to the course of the common law, and not otherwise," the right of challenging peremptorily in cases of high treason, which was incident to a trial at the common law, is thereby virtually restored.

3 Inst. 27.

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By the 7 W. 3, c. 3, § 7, it is enacted, "That every person who shall be indicted for high treason, whereby any corruption of blood may be made, shall have the like process of the court where he shall be tried, to compel his witnesses to appear for him at such trial, as is usually granted to compel witnesses to appear against him."

¶Under the act of Congress of 1790, a copy of the caption of the indictment, as well as of the indictment itself, must be delivered to the prisoner charged with high treason. United States v. Insurgents, 2 Dall. 335.¶

It was not the usage heretofore to examine the witnesses produced on the behalf of a person indicted of treason upon oath.

But by the 7 W. 3, c. 3, § 1, it is enacted, "That every person who shall be indicted for high treason, whereby any corruption of blood may be

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made, shall be admitted to make any proof that he can produce by lawful witness or witnesses, who shall then be upon oath for his just defence ; any law, statute, or usage to the contrary notwithstanding."

And by the 1 Ann. st. 2, c. 9, § 3, it is enacted, "That every person who shall be produced or appear as a witness on the behalf of the prisoner upon any trial for treason, before he be admitted to depose or give any manner of evidence, shall first take an oath to depose the truth, the whole truth, and nothing but the truth, in such manner as the witnesses for the queen are by law obliged to do."

By the 8 & 9 W. 3, c. 25, § 5, it is enacted, "That if any puncheon, die, stamp, edger, cutting engine, press, flask, or other tool, instrument, or engine used or designed for coining or counterfeiting gold or silver money, or any part of such tool or engine, shall be hid or concealed in any place, or found in the house, custody, or possession of any person whatsoever, not then employed in the coining of money in some of his majesty's mints, nor having the same by some lawful authority ; that then it shall be lawful for any person discovering the same to seize, and he is hereby required to seize the same, and to carry it forthwith to some justice of the peace of the county, city, or place where the same shall be so seized, to be produced in evidence against any person who shall be prosecuted for any offence by this act made high treason."

It has been holden, that papers found in the custody of a person indicted for high treason may, although such papers are not in his own handwriting, be read as evidence against him.

6 Sta. Tri. 281, 321, 322, Laver's case.

And it seems to be settled, that papers may, in consideration of law, be in the custody of a person, although they are not actually found upon him.

Lord Preston, together with Ashton, Elliot, and a servant of Lord Preston's, were found concealed under the quarter-hatches of a ship, in which they were going abroad. In the place wherein they were concealed, a packet was seen lying upon the ballast, with a piece of lead fastened to it ; and two seals were found lying near the packet. Upon one of the seals was Lord Preston's coat of arms, the other was a seal belonging to the office of secretary of state, which office had been enjoyed by Lord Preston in the late reign. It appeared, likewise, that the packet was taken up by Ashton, who was tried for the same high treason, for which Lord Preston was tried, and put into his bosom ; from whence it was afterwards taken. It was holden that this packet was so in the custody of Lord Preston, that the papers therein contained might be read as evidence against him.

4 Sta. Tri. 431, 445, 446, 450, Ld. Preston's case.

In a very late case, divers papers were found in a bureau in the prisoner's apartment. With these were found divers seals, with one of which every one of seven letters, proved to be in the prisoner's handwriting, appeared to have been sealed. It appeared also, that the prisoner had the general use of the bureau, which belonged to the person of whom he hired the apartment ; but it likewise appeared, that this person had been sometimes seen to open it in the prisoner's absence. It was holden that these papers were so in the custody of the prisoner, that they might be read as evidence against him.

MS. Rep. Hensey's case, Trin. 31 G. 2 ; [1 Burr. 642.]

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[A paper was found in the possession of a person engaged in the same conspiracy with the prisoner, containing intelligence previously proved to have been collected by the prisoner, which paper was in the handwriting of the prisoner's clerk. This was read in evidence against him. But a paper in the same handwriting so found, not proved to be connected with the prisoner, was not admitted in evidence.

Rex v. Stone, 6 Term R. 529.]

||In a late trial, the indictment, founded both on the 25 Edw. 3, c. 2, and the 36 Geo. 3, c. 7, was for compassing the king's death, conspiring to depose him from the crown of these realms, and levying war against his majesty, to force him to change his measures and counsels; and the overt acts were in substance that the defendants conspired to raise a rebellion, and by means of an armed force to possess themselves of the Tower and the Bank of England, seduce the soldiery, and overthrow the existing government. The counsel for the crown put in evidence certain plans and papers manifestly connected with the conspiracy as detailed by the witnesses, but which had been found at the lodgings of a co-conspirator three days after the apprehension of the prisoner. The co-conspirator had not been at his lodgings for a fortnight before the day when the prisoner was taken, and when he himself absconded; and it appeared that the co-conspirator kept the key of the room, and no one had access to it but himself. The evidence was opposed by the prisoner's counsel, on the ground that it did not appear that these papers ever existed before the apprehension of the prisoner; but the court were clearly of opinion the evidence was admissible, since there was a strong presumption that the papers were in the lodgings previous to the prisoner's apprehension, and they clearly referred to the design of the conspiracy. Evidence was also admitted of the finding a quantity of pikes secreted in the privy of this lodging, though not discovered till near three months after the apprehension of the prisoner; it having been first proved that the prisoner had given his son, a co-conspirator, money to purchase pikes, to take to his lodging. Evidence was also offered of a paper, (found with the others,) containing abstract questions and answers as to military subordination, of a seditious tendency, but not very closely connected with the evidence of conspiracy; no direct proof being given of any intention to use this or any similar paper, the court inclined against its admissibility, and it was withdrawn.

Rex v. Watson, 2 Stark. N. P. C. 140; Sta. Tri. vol. xxxii. (8vo ed.)

On the trial of John Horne Tooke evidence of a similar nature was given. The indictment was for compassing the king's death; and the overt acts charged were, in substance, that the prisoner, with several others named, conspired to procure a convention to be called, to usurp the power of government, depose the king, and subvert the constitution: in support of which the counsel for the crown read the minutes (being first proved to be the true minutes) of the proceedings of two associations, calling themselves, "The Society for Constitutional Information," and "The London Corresponding Society," of the former of which the prisoner was a member; and also various letters addressed from similar societies, in different parts of the country, to their secretaries, found in their possession, or in that of members of other societies, who corresponded with them.—This evidence was objected to by the prisoner's counsel; but the court ruled that all these papers, and the acts of persons engaged in the same design, were admis-

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sible evidence of the general conspiracy. And evidence of the like sort was admitted on the other trials for high treason which took place at the same period.

Rex v. J. H. Tooke, 1794, Sta. Tri. vol. xxv; East, P. C. 98; Rex v. Hardy, Sta. Tri. vol. xxiv.¶

By the 5 Edw. 6, c. 11, § 12, it is enacted, "That no person or persons shall be indicted, arraigned, condemned, convicted, or attainted for any treasons that now be or hereafter shall be perpetrated, committed, or done, unless the offender or offenders be thereof lawfully accused by two lawful accusers; which accusers, at the time of the arraignment of the party, if they be then living, shall be brought in person before the party so accused, and avow and maintain that they have to say against the said party, to prove him guilty of the treason contained in the bill of indictment; unless the said party arraigned shall willingly, without violence, confess the same."

It seems to be the better opinion, that this statute is not repealed by the 1 and 2 Ph. & Mar. c. 10, by which it is enacted, "That all trials of treasons shall be according to the course of the common law:" by which one witness was sufficient in any case.

3 Inst. 26; Fost. 235, 236, 237, 238, 239.

But however that may be, it is, by the 7 W. 3, c. 3, § 2, enacted, "That no person shall be tried or attainted of high treason, whereby any corruption of blood may be made, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other to another overt act of the same treason, unless the party indicted and arraigned, or tried, shall willingly, without violence, in open court confess the same, or shall stand mute or refuse to plead, or in cases of high treason shall peremptorily challenge above the number of thirty-five of the jury; any law, statute, or usage to the contrary notwithstanding."

¶It would appear to be the intent of the 39 & 40 G. 3, c. 93, that where the overt act is the assassination, or an attempt against the life, of the king, one witness should be sufficient. Vide East, P. C. 129.¶ β The Constitution of the United States, art. 3, s. 3, provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.γ

In an indictment for compassing or imagining the king's death, the being armed with a dagger for the purpose of killing the king was laid as one overt act, and the being armed with a pistol for the same purpose as another overt act. It was holden, that proving one of the overt acts by one witness, and the other by a different witness, was proof by two witnesses within the meaning of the 7 W. 3, c. 3.

5 Sta. Tri. 38, Vaughan's case; Raym. 207.

At a meeting of the judges, on the 12th day of January, 1707, to consider of some matters relative to the intended trial of Gregg for high treason, Holt, C. J., Powel, J., Powis, J., Smith, J., Dormer, J., and Bury, J., were of opinion, that the prisoner's confession, although not made in court, if proved by two witnesses to have been voluntarily made, notwithstanding what is contained in the 7 W. 3, c. 3, § 2, was sufficient evidence to convict upon: but Trevor, C. J., was of a contrary opinion; and Tracy, J., doubted.

MS. Rep. Gregg's case.

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But at a conference of the judges, in the year 1716, it was agreed, that only a confession upon an arraignment is within the meaning of the 5 and 6 Edw. 6, c. 11, and that this is so because it amounts to a conviction.

Fost. 241.

And it seems to be the better opinion, that if the confession of the prisoner be not made in open court, it ought only to be admitted in corroboration of other evidence, and that two witnesses besides confession are necessary to a conviction.

Fost. 241, 242.

By the 7 W. 3, c. 3, § 4, it is enacted, "That if two or more distinct treasons of divers heads or kinds shall be alleged in one bill of indictment, one witness produced to prove one of the said treasons, and another produced to prove another of the said treasons, shall not be deemed or taken to be two witnesses within the meaning of this act."

As it is only made necessary by the 7 W. 3, c. 3, to prove one overt act of high treason, by which corruption of blood may be made by two witnesses, or two overt acts of the same treason by two witnesses, every other fact collateral to an overt act of high treason may be proved by one witness.

5 Sta. Tri. 38, Vaughan's case.

It has been holden, that if it be necessary to prove a person indicted for high treason to be one of the king's subjects, it is sufficient to prove this by one witness.

5 Sta. Tri. 38, Vaughan's case.

It seems to be the better opinion, that two witnesses are necessary to convict a person indicted for petit treason, for that the 5 & 6 Ed. 6, c. 11, is not, as to this, repealed by the 1 & 2 Ph. & M. c. 10.

Fost. 233, 239, 337.

By the 7 W. 3, c. 3, § 8, it is enacted, "That no evidence shall be admitted or given of any overt act of high treason, which is not expressly laid in the indictment, against any person whatsoever."

But it is laid down, that where one overt act of treason, not laid in the indictment, conduces to the proof of another therein laid, evidence may be given of that overt act.

4 Sta. Tri. 38, Vaughan's case; {1 Dall. 39, *Respublica v. Roberts*; 2 Dall. 86, *Respublica v. M'Carty*.}

If the overt act of treason laid in the indictment be a consultation to kill the king, any acting in pursuance of the consultation may be given in evidence; for this does not only prove a consent to the killing of the king, but it is moreover a proof of the overt act laid.

5 Sta. Tri. 38, Vaughan's case; Salk. 634.

[A letter sent by one of several conspirators in pursuance of the common design, with a view of reaching the enemy, is evidence against all engaged in the same conspiracy.

Rex v. Stone, 6 Term R. 527.]

¶ On an indictment for high treason, it having been proved that the defendant had enlisted in the enemy's army, evidence was admitted to show that he had attempted, without success, to prevail on another to enlist, for

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the purpose of showing *quo animo* the defendant himself had joined the enemy.

Respublica v. Roberts, 1 Dall. 39.

On an indictment for treason, evidence is not admissible to show that the defendant joined in the commission of a felony, for which he was charged in another indictment.

United States v. Mitchell, 2 Dall. 357.

Evidence may be given of an overt act committed in another county, after an overt act has been proved to have been committed in the county where the indictment is laid and tried.

United States v. Malin, 1 Dall. 33.*g*

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By the 7 W. 3, c. 3, § 9, it is enacted, "That no mis-writing, mis-spelling, or false or improper Latin, shall, after conviction upon an indictment for high treason, be any cause to stay or arrest judgment thereupon."

But by the same section it is provided, "That any judgment given upon such indictment shall be liable to be reversed upon a writ of error, in the same manner as if this act had not been made."

If a man be convicted of high treason, that judgment which is called the solemn judgment is in some cases to be pronounced, in others that which is called the less solemn judgment.

But, if a woman be convicted of high treason, the judgment to be pronounced in all cases is, that she be carried to the prison from whence she came, and be drawn from there to the place of execution; and that she be there burnt.*(a)*

[*(a)* Vide 30 G. 3, c. 48, which directs that the judgment against women on conviction of high treason shall no longer be that they shall be burned, but only hanged; and that, on conviction of petit treason, they shall receive the same sentence as persons convicted of wilful murder.]

The solemn judgment of high treason is always to be pronounced by the chief judge of the court.

Kel. 11.

The form of the solemn judgment is different in different books. Nor is this to be wondered at: for it appeared, upon great search of records, in the case of Walcot, that before the time of Henry the Seventh, the form of this judgment was very uncertain, there being scarce two judgments to be found of which the form was the same.

Carth. 349, Walcot's case.

The following seems, from divers books, to be the most approved form of the solemn judgment: that the person convicted be carried to the prison from whence he came, and be drawn from thence to the place of execution; that he be there hanged by the neck, and be cut down whilst he is alive; that his bowels be cut out of his body, and be burnt before his face; that his head be severed from his body, and his body be divided into four quarters; and that his head and quarters be disposed of as the king pleases.

Staundf. P. C. lib. 3, c. 19; 3 Inst. 210; 1 H. H. P. C. 350; Carth. 315; Kil-marnock's Tr. 38.

The king may, by a warrant under the great seal, privy seal, privy signet, or sign manual, discharge or pardon such part of the punishment awarded by the solemn judgment as he pleases.

1 H. H. P. C. 351, 384.

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And it is usual, when a nobleman or other great man falls under this judgment, to pardon the whole of the punishment except the beheading.

1 H. H. P. C. 351, 384.

According to Staundford's account, part of the solemn judgment was heretofore, to be drawn *upon a hurdle*.

Staundf. P. C. lib. 3, c. 19.

But no mention is made by Coke, C. J., of drawing upon a *hurdle*; nor is this mentioned in a modern judgment.

3 Inst. 210, Kilmarnock's Tr. 38.

And drawing upon a hurdle does not seem ever to have been a necessary part of the solemn judgment; for Shard, J., once ordered a man, convicted of high treason, to be drawn, without being placed upon any thing, by horses to the place of execution: but this severity is not now used; the convicted person being always drawn upon a hurdle.

1 H. H. P. C. 382.

Part of the judgment, according to the form in Staundford, was heretofore, that the privy members should be cut off.

Staundf. P. C. lib. 3, c. 19.

But Coke, C. J., does not mention cutting off the privy members as any part of this judgment; and it appears from some modern judgments, that it is not a necessary part thereof.

3 Inst. 210.

A writ of error being brought to reverse an attainder of high treason, one error assigned was, that the words *secreta membra amputentur* were omitted in the judgment. Samuel Eyre, J., was of opinion that the attainder ought not for this reason to be reversed; because the omission of these words is warranted by many precedents. Giles Eyre, J., seemed to think, that these words, as the practice at that time was to insert them, ought to have been inserted; but by reason of the multitude of precedents doubted. Holt, C. J., gave no opinion as to this point. The attainder was reversed for another reason: and no notice is taken in the judgment of reversal, which was afterwards affirmed by the House of Lords, of the omission of these words.

Ld. Raym. 1, 2, Tucker's case.

It was no part of a judgment, pronounced, not many years ago, by Lord Hardwicke, High Steward, that the privy members should be cut off.

Kilmarnock's Tr. 38.

In divers old cases, and in some cases in the time of Charles the Second, the words *before his face*, or the words *whilst he is alive*, which are holden to be tantamount to the words *before his face*, are not inserted in the judgments after the words *and be burnt*.

12 Mod. 95, 96, Walcot's case; Carth. 349.

But the more general usage has been, to insert the words *before his face*, or the words *whilst he is alive*; and the attainder was, in Walcot's case, reversed by the Court of King's Bench, because both these sets of words were omitted; and the judgment of reversal was affirmed by the House of Lords.

12 Mod. 95, 96, Walcot's case.

The less solemn judgment of high treason is, that the person convicted be carried to the prison from whence he came; and be drawn from thence

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to the place of execution; and that he be there hanged by the neck until he be dead.

Staundf. P. C. lib. 3, c. 19; 3 Inst. 211; 1 H. H. P. C. 351.

It was in one case doubted, whether, when the less solemn judgment of high treason is to be pronounced by the Court of King's Bench, it is to be pronounced by the Chief Justice, or, as is done in felonies, by the ancient justice. The judgment was in that case pronounced by the ancient justice; but, to avoid all scruple, it was pronounced over again by the Chief Justice.

1 Ventr. 254, Bellew's case; Staundf. P. C. lib. 3, c. 19.

It is laid down in two books, that the solemn judgment ought to be pronounced in every case of high treason except that of counterfeiting the king's money contrary to the 25th Ed. 3, st. 5, c. 2.

3 Inst. 15; 3 Inst. 17.

The reason given for excepting the case of counterfeiting the king's money contrary to the 25 Ed. 3, st. 5, c. 2, is, that as the judgment for this offence, which was high treason at the common law, was only to be drawn and hanged, the same judgment, as that statute makes no alteration in the punishment, ought still to be pronounced: but that where an offence is made high treason by a statute subsequent to the 25 Ed. 3, st. 5, c. 2, the judgment ought to be, as it is of all other high treasons at the common law, except that of counterfeiting the king's money, to be drawn, hanged, and quartered.

But it seems to be the better opinion, that, in some other cases of high treason, as well as that of counterfeiting the king's money contrary to the 25 Ed. 3, st. 5, c. 2, the less solemn judgment ought to be pronounced.

It appears from one case, that the less solemn judgment was, some years after the 25 Ed. 3, st. 5, c. 2, pronounced in the case of counterfeiting the great seal.

2 H. 4, 25; 1 H. H. P. C. 181.

Coke, C. J., does indeed say, in speaking of this judgment, that it must be misreported.

3 Inst. 15.

But Hale, C. J., is of opinion, that Coke, C. J., was himself mistaken: for that the judgment, in the case of counterfeiting the great seal, may be either to be drawn and hanged; or to be drawn, hanged, and beheaded.

1 H. H. P. C. 352.

The opinion of Hale, C. J., seems to be upon the whole right: but it seems a little strange to say, that either the solemn or the less solemn judgment may be pronounced in this case, which is a latitude unknown to the English law; and the rather, as he had but a few lines before said, upon the authority of both Bracton and Fleta, that, at the common law, the punishment of counterfeiting the great seal was, to be drawn and hanged.

1 H. H. P. C. 351.

If this were the punishment at the common law of that offence, the consequence must be, as is laid down by Coke, C. J., in the case of counterfeiting the king's money, that, as the 25 Ed. 3, st. 5, c. 2, has made no alteration in the mode of punishing this offence, the same punishment ought to be inflicted upon the person guilty thereof as was inflicted at the common law.

3 Inst. 17.

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Hale, C. J., has, with great propriety, distinguished the cases upon statutes subsequent to the 25 Ed. 3, st. 5, c. 2, by which divers offences relative to the coin have been made high treasons, from cases of offences made high treason which were not so at the time of making that statute: his distinction is, that in the latter cases, as in offences against the Protestant religion, the solemn judgment ought to be pronounced; but that, in offences relative to the coin, although some of these are made high treasons by statutes subsequent to the 25 Ed. 3, st. 5, c. 2, the less solemn judgment ought, for the following reasons, to be pronounced.

1 H. H. P. C. 352.

As these offences are *in cognita materia falsificationis monetae*, they are within the verge of the crime of falsifying money; and therefore ought to be punished in the same way as this crime is to be punished.

1 H. H. P. C. 352.

It is unreasonable to think that the legislature could intend to inflict a more severe punishment upon the counterfeiters of foreign coin, or upon the clippers of the king's money or foreign coin, than upon the counterfeiters of the king's money.

1 H. H. P. C. 352.

In support of this distinction, divers cases are mentioned.

In one of these it is said to have been agreed by all the judges, that the less solemn judgment ought to be pronounced in a case of clipping the king's money, which offence was made high treason by the 5 Eliz. c. 11.

Dyer, 230, Wright's case, Trin. 6 Eliz.

In some subsequent cases of clipping the king's money, the solemn judgment was indeed pronounced: but it appears, upon looking into all the cases since Wright's case, that in much the greater part of them the less solemn judgment was pronounced.

1 H. H. P. C. 353.

And in one of these it was resolved by all the judges, except Vaughan, C. J., after a consultation had with the serjeants at Serjeants' Inn, that the less solemn judgment ought to be pronounced in the case of clipping the king's money.

2 Lev. 98, Ballow's case, Hil. 25, Car. 2.

It is admitted by Hale, C. J., that in one case, which was Mich. 16 Jac. 1, the solemn judgment was pronounced upon a man convicted of counterfeiting the privy signet, which offence was made high treason by the 1 Mar. st. 2, c. 6.

1 H. H. P. C. 252; 2 Roll. Rep. 50.

But as this case was determined before the law was settled in Ballow's case, as to the judgment of offences relative to the coin, which have been made high treasons by statutes subsequent to the 25 Ed. 3, st. 5, c. 2, it may be fairly inferred that, so far from being sufficient to overthrow the reasoning of Hale, C. J., and the cases mentioned by him, the case is not at this day law.

Judgment of high treason was in one case, upon a trial at bar, pronounced upon the day the prisoner was convicted.

6 Sta. Tri. 655, Staley's case.

But this judgment is, in a subsequent case, declared to be an unpre-

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cedented one ; and it is in the latter case laid down by Holt, C. J., that, if a prisoner have been convicted of high treason upon a trial at bar, the judgment ought not to be pronounced in less than four days after the conviction, provided there are so many remaining days in the term ; because the prisoner ought to have so many remaining days to move in arrest of judgment ; and it is added, that, in case there are not four remaining days in the term, the judgment ought to be pronounced upon the last day of the term.

4 Sta. Tri. 767, Knightley's case.

If a person have been attainted upon a judgment of outlawry on an indictment of high treason, no other judgment is to be pronounced : but a rule of court is to be made for his execution ; that judgment, which is upon record, being a sufficient ground for the awarding of execution.

3 Sta. Tri. 855, 858, ||vol. x. p. 1, (8vo ed.) ;|| Holloway's case, ||3 Mod. 42.||

||By 5 & 6 Edw. 6, c. 11, § 7, all process of outlawry against any offenders in treason, being resiant or inhabitant out of this realm, or in parts beyond the sea, at the time of the outlawry pronounced against them, shall be as effectual in the law, to all intents and purposes, as if such offenders had been resident and dwelling within this realm at the time of such process awarded and outlawry pronounced. Provided, (§ 8,) that if the party outlawed shall, within one year next after the said outlawry pronounced, or judgment given thereon, yield himself to the Chief Justice of England, and offer to traverse the indictment or appeal whereon the said outlawry shall be pronounced, then he shall be received to the said traverse, and being thereupon found not guilty by verdict, shall be acquitted and discharged of the said outlawry as though it had not been made.

One outlawed and retaken in England was, notwithstanding his being in custody, held entitled to surrender himself and traverse the indictment under this proviso ; and on proving himself to have been beyond sea at the time of the outlawry, it was reversed, and he was admitted to a trial and acquitted. And Armstrong's case,^(a) which had been decided otherwise by Chief Justice Jefferies and the Court of King's Bench, and the prisoner attainted and executed, was declared an unfit precedent to follow.

Johnson's Ca., Foster, C. L. 46 ; 10 Sta. Tri. 111, (8vo ed.) (a) See this case, 10 Sta. Tri. 106, (8vo ed.) ; Burnet's Hist. vol. ii. 407 ; 3 Mod. 47 ; and see Erskine's remarks on C. J. Jefferies' conduct in it, Trial of Hardy, Speeches, vol. iii. 451. The execution of Armstrong was, in 1689, resolved by the Commons to be "illegal, and a murder by pretence of justice." Sir Robert Sawyer, the attorney-general, who prosecuted him, was expelled the House of Commons. The survivors of the judges who decided against him, and the executors of Jefferies, who was dead, were summoned to the bar of the House ; and it was resolved that 5000*l.* should be paid by the judges and prosecutors to Armstrong's lady and children for their losses by the attainder. The bill for reversing the attainder, however, did not pass ; and it was only reversed on writ of error, in 6 Will. & Ma. 4 Mod. 366 ; Salk. 504 ; Sta. Tri. vol. x. 117, *notis*, (8vo ed.) ; 5 Cobb. Parl. Hist. 445, 516. And see remarks on the award of execution against Armstrong, by Sir John Hawles, solicitor-general to William III., Sta. Tri. vol. x. 123 ; Mr. Hargrave's remarks on Sir Robert Sawyer's conduct, preface to Hale's Jurisdict. of the Lords, cxli. note.||

In every case wherein a person is convicted of petit treason, the less solemn judgment is to be pronounced.

Staundf. P. C. lib. 3, c. 19 ; 3 Inst. 211 ; [St. 30 G. 3, c. 48, *suprd.*]

||By the 54 Geo. 3, c. 146, reciting that in certain cases of high treason the sentence or judgment is, that the person convicted shall be drawn on a

Trespass.

hurdle to the place of execution, &c., (*as in the solemn judgment,*) it is enacted, "That in all cases in which the judgment is as aforesaid, the judgment to be pronounced after the passing of that act shall be, that the person shall be drawn on a hurdle to the place of execution, and be there hanged by the neck until such person be dead; and that afterwards the head shall be severed from the body, and the body divided into four quarters, shall be disposed of as his majesty shall think fit."

The second section authorizes his majesty by warrant^(a) under his hand, countersigned by one of the principal secretaries of state, to order and direct that such person shall not be drawn, but taken in some other manner, to the place of execution; and that such person shall be decapitated, and not hanged; and also to direct in what manner the body, head, and shoulders of such person shall be disposed of.

(a) This merciful prerogative was exercised in the case of Thistlewood and others, executed in 1820, Sta. Tri. vol. xxxiii. 1566; and also in the case of Brandreth and others, executed at Derby in 1817, Sta. Tri. vol. xxxii. p. 1394.¶

TRESPASS.

THE word trespass is derived from the French word *trespasser*, which signifies to go beyond what is right. It follows, that every injurious act is, in the large sense of the word, a trespass.^(b) But as divers injurious acts are called felonies, and are distinguished by particular names, as treason, murder, &c., the word trespass does not, in the legal sense thereof, extend to any such injurious acts.

β(b) The term trespass comprehends such injuries or acts, and such only as are committed with violence, *vi et armis*, to the person, property, or relative rights of another, whereby a damage has ensued. Ham. N. P. 33; Cotteral v. Cummins, 6 S. and R. 348; Berry v. Hammil, 12 S. and R. 210; Legaux v. Feasor, 1 Yeates, 586; Barnes v. Hurd, 11 Mass. 59; Cole v. Fisher, 11 Mass. 137; Starr v. Jackson, 11 Mass. 525; Caster v. Murray, Harper, 113; Clay v. Sweet, 1 Marsh. 194; Johnson v. Castleman, 2 Dana, 378; Waldron and Hopper, Coxe, 339; Winslow v. Beall, 6 Call. 44; Percival v. Hickey, 18 Johns. 257; Guille v. Swan, 19 Johns. 381.¶

Some trespasses are not accompanied with force. A trespass of this kind is called a trespass upon the case: and the method of proceeding against the wrong-doer is by an action of trespass upon the case. This action has been already treated of, under the title "ACTION UPON THE CASE."

Other trespasses are accompanied with force, either actual or implied.

If a trespass accompanied with actual force have been injurious to the public, the proper method of proceeding against the wrong-doer is by indictment or information. If a trespass accompanied with actual force have only been injurious to one or a few persons, the wrong-doer may in some cases be proceeded against by indictment or information, and in all by indictment; for, although the injury was done only to one or a few persons, yet, as every trespass accompanied with actual force amounts to a breach of the peace, it is an offence against the public.

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The method of proceeding by indictment or information, against persons guilty of such trespasses as are offences against the public, has been shown under the titles "INDICTMENT" and "INFORMATION."

Besides being liable to an indictment (a) or information, the person guilty of a trespass accompanied with actual force, which has been injurious to one or a few persons, is liable to an action of trespass.

¶(a) 2 Kenyon's R. 512. ¶ β An action of trespass is one instituted for the recovery of damages, for a wrong committed against the plaintiff, with immediate force; as, an assault and battery against his person, an unlawful entry into his land, or an unlawful injury with direct force to his personal property, or to his relative rights. Ham. N. P. ch. 1. §

If a trespass, not accompanied with actual force, have only been injurious to one or a few persons, the only method of proceeding against the wrong-doer, this not being a public offence, is by an action of trespass.

The writ by which an action of trespass is commenced, is sometimes returnable, at other times it is not. It is in the election of the party injured by a trespass, to sue out a writ of trespass that is returnable, or one that is not. The latter writ is called a vicontiel writ; because the matter therein complained of is to be determined before the sheriff to whom the writ is directed.

As the vicontiel writ of trespass is at this day very seldom sued out, it is by no means necessary to go into the consideration of the action thereupon founded.

The design at present is to treat of that action which is founded upon the returnable writ of trespass.

As the writ of trespass which is returnable always contains the words *vi et armis*, the action founded thereupon is, to speak with propriety, *an action of trespass vi et armis*. But, as such action is almost as frequently called *an action of trespass*, as *an action of trespass vi et armis*, and as it is by the former name sufficiently distinguishable from *an action of trespass upon the case*, it is by no means necessary to add, in treating thereof, the words *vi et armis*.

Divers things relative to an action of trespass, as tender and bringing money into court, damages, and costs, have been treated of, under the titles "TENDER AND BRINGING MONEY INTO COURT," "DAMAGES," and "COSTS."

The remaining matter, which appertains to this Title, shall be arranged in the following order:

- (A) In what cases an Action of Trespass in the general lies: ¶And herein of the distinction between Actions of Trespass and on the Case.¶
- (B) In what Cases an Action of Trespass lies for an Act which, although it was in the first Instance lawful, becomes afterwards a Trespass *ab Initio*.
- (C) By whom an Action of Trespass may be brought.
 - 1. *Where the Injury was done to a Person.*
 - 2. *Where the Injury was done to Personal Property.*
 - 3. *Where the Injury was done to Real Property.*
- (D) For what Injuries to the Person an Action of Trespass lies.
 - 1. *For a Battery.*
 - 2. *For an accidental Stroke.*
 - 3. *For a false Imprisonment.*

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(E) For what Injuries to Personal Property an Action of Trespass lies.

1. *To live Property.*
2. *To dead Property.*

(F) For what Injuries to Real Property an Action of Trespass lies.

1. *To Land.*
2. *To a Building.*

(G) Against whom an Action of Trespass may be brought.

1. *In the General.*
2. *For an Injury to Real Property.*

(H) In what Court an Action of Trespass may be brought.

(I) Of the Pleadings in an Action of Trespass.

1. *Of the Writ.*
2. *Of the Declaration.*
 1. In the General.
 2. Of declaring with a *Continuando*.
3. *Of the Plea.*
 1. Of pleading in Abatement.
 2. Of pleading in Chief.
 1. The General Issue.
 2. A Special Plea.
 3. Both the General Issue and a Special Plea.
 4. Of giving Colour.
4. *Of the Replication.*
 1. In the General.
 2. Of making a new Assignment.

(K) Of the Evidence in an Action of Trespass.

β (L) Of damages in the Action of Trespass.γ

(A) In what Cases an Action of Trespass in the general lies: ¶ And herein of the distinction between Actions of Trespass and on the Case.¶

WHEREVER an injury has been received from an act which was in the first instance unlawful, an action of trespass lies, although the act were not accompanied with actual force, there being in every such case an implied force. But, where the injury which has been received was the consequence of an act which was in the first instance lawful, an action of trespass does not in the general lie, the proper remedy being an action upon the case.(a)

Stra. 635, Reynolds v. Clarke; Ld. Raym, 1402, S. C. β In trespass *vi et armis*, it is immaterial whether the injury be committed wilfully or not. Taylor v. Rainbow, 2 H. & M. 423.γ [(a) The *lawfulness* or *unlawfulness* of the original act, is not the criterion between an action of *trespass* and an action *on the case*, nor is it to be found in Lord Raymond's report of the above case; it is argumentatively denied by Fortescue, J., in the instances put by him in Strange's report, and expressly controverted by Blackstone, J., in Scott v. Shepherd, 2 Bl. R. 894; 3 Wils. 499; and by De Grey, C. J., S. C., 2 Bl. R. 899; 3 Wils. 411, in which last case several instances are put, where *trespass* will lie for the consequences of an act *lawful* in its commencement, and *case* for those where the original act was unlawful. The true and solid distinction is between *direct and immediate* injuries on the one hand, and *mediate or consequential* on the other; and trespass never lay for the latter. Shapcott v. Mugford, 1 Ld. Raym. 187; Howard v. Banks, 2 Burr. 1114; Hawker v. Birbeck, 3 Burr. 1556; Gates v. Bayley, 2 Wils. 313; Scott v. Shepherd, *ubi supra*; Morgan v. Hughes, 2 Term R. 225; Day v. Ed-

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wards, 5 Term R. 648; Savignac v. Roome, 6 Term R. 125; {8 Term, 188, Ogle v. Barnes; 3 East, 593, Leame v. Bray; 1 Esp. Rep. 55, Sheldrich v. Aberly; 1 Mass. T. Rep. 145, Adams v. Hemmenway; 2 Hen. & Mun. 423, Taylor v. Rainbow. See 5 Bos. & Pul. 117, 446.} But when we say that trespass never lay for *consequential injuries*, we thereby mean such acts as consequentially only become injurious; not that consequential damages can only be redressed in an action on the case. For where the act done is a direct invasion of the plaintiff's property in possession, consequential or remote, as well as immediate, damage may well be set forth in the declaration in trespass *vi et armis*: as, that the defendant entered into the plaintiff's grounds and destroyed his fences, *by means whereof the cattle of divers strangers escaped thither and consumed the grass.* 3 Wooddes. 253;] [and see next page.]

β When an injury is caused *immediately* by the act of another, whether wilfully or carelessly, trespass is the proper remedy.

Catteral v. Cummings, 6 S. & R. 348; Legaux v. Feasor, 1 Yeates, 586; Berry v. Hamill, 12 S. & R. 210; Loubz v. Haffner, 1 Dev. 185; Gardner v. Neil, 1 Car. Law Repos. 492; Waldron v. Hopper, 1 Penning. 339; Post v. Munn, 1 South. 61; Cole v. Fisher, 11 Mass. 137; Barnes v. Hurd, 11 Mass. 57; Starr v. Jackson, 11 Mass. 525; Rappleyer v. Hulse, 7 Halst. 257; Dilts v. Kinney, 3 Green, 130; Case v. Mark, 2 Ohio, 170; Clay v. Sweet, 1 Marsh. 194; Waldron v. Hopper, Coxe, 339; Carsten v. Murray, Harp. 113; Guille v. Swan, 19 Johns. 381; Percival v. Hickey, 18 Johns. 257; Johnson v. Castleman, 2 Dana, 378; Sinnickson v. Dungan, 3 Halst. 226; Muse v. Vidal, 6 Munf. 27; Greer v. Emerson, 1 Overt. 13; Blount v. Mitchell, 2 Hayw. 55; Coltrain v. M'Cain, 3 Dev. 308.

When there is an *immediate* injury attributable to *negligence*, the plaintiff may elect to regard the negligence as the cause of the action, and declare in case; or to consider the act itself as the injury, and declare in trespass.

Blin v. Campbell, 14 Johns. 432; M'Allister v. Hammond, 6 Cowen, 342; Dalton v. Favour, 3 N. H. Rep. 465; but see Gates v. Miles, 3 Conn. 64. See for the distinction between trespass *vi et armis* and trespass on the case, Ham. N. P. 4 to 32.

Two vessels were sailing in opposite courses, under the directions of their respective owners, when, at the distance of about thirty rods from each other, one of them ordered his helmsman *to luff*, which he did, and in consequence of his so doing, that vessel struck and injured the other. Held, that trespass and not case was the proper remedy.

Gates v. Miles, 3 Conn. 64.γ

{Trespass and not case lies against a sheriff who serves an execution after the return-day.

4 Johns. Rep. 450, Vail v. Lewis.}

If one man fix a spout for the carrying of water from his house, and the water thereby carried fall and do damage upon the ground of another, the latter cannot maintain an action of trespass; for, as the fixing of the spout was lawful, the injury is consequential.

Stra. 635, Reynolds v. Clarke; Ld. Raym. 1402, S. C.

If J S dig a trench in his own land, or in the land of a stranger, by which the water is diverted from the river of J N, J N cannot maintain an action of trespass, inasmuch as he had no right to complain of the act done by J S until the consequence thereof was injurious to him.

Ld. Raym. 1402, Leveridge v. Hodges. β Case is the proper remedy for digging a ditch, round about and in front of plaintiff's land, so that access to his land was rendered inconvenient. Runyan v. Bodine, 2 Green, 432.γ

If an injury be the consequence of non-feasance, an action of trespass does not lie; for there cannot have been any force, either actual or implied, where no act has been done.(α)

[(α) It seems a party may become a trespasser by the mere continuance of an unlawful act. 11 East, 402; 1 Stark. Ca. 22.]

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If the person entitled to tithe do not, after having received notice that the tithe is set out, fetch it away in a reasonable time, he is liable to an action upon the case for the injury sustained by the lying thereof too long upon the land: but an action of trespass does not lie, because the injury arises from non-feasance.

Ld. Raym. 188, *Shapcott v. Mugford*. ||And the land owner cannot, in such case, turn in his cattle upon the tithes, but he must either bring his action, or distrain the tithes damage feasant. *Williams v. Ladner*, 8 Term R. 72.||

If J S, who ought to repair the bank of a river, neglect to do it, and for want of its being done the ground of J N be overflown, J N may recover a satisfaction for the injury in an action upon the case; but he cannot maintain an action of trespass, because the injury arises from non-feasance.

Bro. *Act. sur le case*, pl. 36; Fitz. N. B. 93.

It is said in one case, that if A break the hedge of B to the value of fourpence, and beasts of common of J S enter through the breach into the close of B and do damage, B shall recover damages for the whole injury in an action of trespass against A. But it is laid down in another case, that if an injury, for which the proper remedy is an action upon the case, be contained in the declaration in an action of trespass, judgment ought, in case there is a general verdict for the plaintiff, to be arrested; (a) because the judgment against the defendant in an action of trespass is *quod capiatur pro fine*, whereas the judgment against the defendant in an action upon the case is *quod sit in misericordia*.

Bro. *Tresp.* pl. 179; Ld. Raym. 273; *Courtney v. Collet*, Carth. 437, S. C. [(a) So *è converso*, *Savignac v. Roome*, 6 Term R. 125.]

If, however, one injury, for which the proper remedy is an action upon the case, be, after alleging an injury proper for an action of trespass, contained in the declaration in an action of trespass under a *per quod*, judgment may be given, although there is a general verdict for the plaintiff; (b) because that which comes under the *per quod* is not considered as an independent substantive injury, but is laid in aggravation of damages.

Ld. Raym. 273; *Courtney v. Collet*, Stra. 635. ||(b) The two cases in Bro. *Tresp.* pl. 179, and Ld. Raym. 273, are quite reconcilable. In order to recover damages for the whole matter in the case put in Broke, there would be no joinder of trespass and case; the gist of the action would be the trespass in breaking the hedge *vi et armis*, and the entry of the cattle of J S, and the damage done would be matter of aggravation laid under a *per quod*. But in the case in Ld. Raym. 273, the declaration first stated a trespass *vi et armis* in breaking plaintiff's close, and treading down the grass, and then stated another distinct cause of action in throwing down a wear, whereby the watercourse inundated plaintiff's fishery. The court decided that trespass and case clearly could not be joined, but they gave judgment for the plaintiff, holding the latter cause of action to be *trespass*: (which decision appears irreconcilable with *Reynolds v. Clarke*, Lord Raym. 1402.) This case, therefore, in no way militates against the settled practice of laying consequential damage arising out of a trespass as matter of aggravation in an action for the trespass; and see 2 Maul. & S. 77.||

[An action on the case was brought for damaging a colliery of the plaintiff, who obtained a verdict, and had an entire judgment on the three counts in the declaration. It was objected, that two of the counts described a trespass *vi et armis*; for in them it was alleged, that the defendant caused great quantities of water to be conveyed through divers other collieries into that of the plaintiff; and that a count in trespass cannot be joined in the same declaration with a count in an action on the case. The court overruled the objection, saying, "that the plaintiff in his declaration described a fact, which might, at the trial, be proved to be either proper for an ac-

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tion of trespass, or on the case, according to the evidence: and it appears that it was here proved at the trial to be the latter. If it had been proved to be trespass *vi et armis*, the plaintiff must in that event have been nonsuited. Before the trial it stood indifferent, whether it would come out to be the one or the other. However, in the nature of the thing, it must be a consequential damage; as the act complained of was done on the defendant's own soil."

Haward v. Banks, 2 Burr. 1114.]

It is laid down in one book, that if the bailee of cattle, which have been lent him to plough his land with, kill any of them, the owner of the cattle has an election to bring an action of trespass, or an action upon the case. But it is laid down in other books, that the bailee of cattle who has killed any of them, is not liable to an action of trespass, because he came lawfully to the possession of the cattle; the proper remedy being an action upon the case.(a)

1 Inst. 57; Bro. *Act. sur le Case*, pl. 99; Bro. *Tresp.* pl. 295. ||(a) There is no doubt that trespass will lie in such a case, "because," as Lord Coke says, "when the bailee, having but a bare use of the cattle, taketh upon him as owner to kill them, he loseth the benefit of the use of them." Co. Lit. 57 a; and upon the same principle, trees cut down by a tenant during the term, instantly become the property of the owner of the inheritance, and he may maintain trespass or trover for them. 7 Term R. 12; Farrant v. Thompson, 5 Barn. & A. 826. But for a *mere injury* to or seizure of a chattel bailed or demised, the owner's remedy is case; for such injury does not divest the bailee's property during the bailment or term, and the owner's interest is only in reversion; and whether the injury be by the bailee himself or by a stranger appears to make no difference as to the form of remedy. Gordon v. Harper, 7 Term R. 9; Hall v. Pickard, 3 Camp. 187; Pain v. Whittaker, Ry. & Moo. Ca. 99. But if the bailment be merely gratuitous, the owner may maintain trespass against a stranger who injures the chattel. Lotan v. Cross, 2 Camp. 464.||

It is in one book laid down, that the party injured by a rescue may have either an action of trespass, or an action upon the case.

Hob. 180, Wheatley v. Stone. ||And in Cro. Ja. 171, and Moor, 694, it is said that rescous is in nature of a trespass. But that it is neither strictly trespass, nor an action on the case, appears from this, that it is held not within the Writ of Error Act, 7 Eliz. c. 8, though actions of trespass, and actions on the case, are both expressly named. Cro. Ja. 171; 2 W. Saund. 101 c. In Com. Dig. *Rescous*, D. 2, it is classed as an action on the case; and see 8 Term R. 127. But it is nevertheless laid *vi et armis*, F. N. B. 101, and may be joined with a count for assault, F. N. B. 102, D, or for pound breach, Ld. Raym. 83, and, as it seems, for any cause of action either in trespass or case. Chitt. on Pleading, vol. ii, 336.||

[A threw a lighted squib into a market-house, where a large concourse of people were assembled: the squib fell upon the standing of B, who, to prevent injury to himself and his wares, threw it across the market-house, when it fell upon the standing of C. C took it up, threw it among the crowd, when it burst, and put out the eye of D. The court of C. B., Blackstone, J., dissent., held that trespass lay against A at the suit of D, the new direction and the new force given it by B and C not being a new trespass, but merely a continuation of the original force impressed upon it by A.

Scott v. Shepherd, 2 Bl. R. 892; 3 Wils. 499.]

||"This case," as observed by De Grey, C. J., "is one of those wherein the line drawn by the law between actions on the case, and actions of trespass, is very nice and delicate." The difficulty which has arisen in applying this distinction as to trespass and case, has been chiefly in actions for injuries done in driving carriages and navigating vessels. If the car-

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riage or the vessel is to be considered as a mere passive instrument, not less subservient to the person directing it than a gun or a stick held in his hand, it would follow that all immediate injuries received from its contact, while under an individual's direction, whether arising from accident, negligence, or wilfulness, are as much trespasses committed by him, as a wound from his gun or a blow from his stick; and it is in this light that such injuries appear to have been regarded by Lord Ellenborough and the Court of King's Bench, in several cases. On the other hand, some other decisions seem to ascribe something of independent agency to a vessel under sail and a carriage drawn by horses; and it has been held, that an injury received from their contact, if accidental and not wilful, does not amount to an immediate trespass, but only to a case of consequential damage.

The King's Bench have thus held, that the owner of a carriage, who drove it in the dark against another, was liable to an action of trespass, though the injury was entirely accidental; and Lord Ellenborough, at *Nisi Prius*, decided the same in the case of the owner of a vessel, who, being himself at the helm, ran against another ship from mere unskilful management. In the case of a similar accident arising from the negligence of a pilot, the owner being on board, the Court of Common Pleas held that the remedy against the owner was trespass on the case: distinguishing this case from *Leame v. Bray*, on the ground that the owner, though on board, was not governing the ship or giving the order which occasioned the accident; but the court at the same time questioned the decision in *Leame v. Bray*. Assuming that the owner, though aboard, was as if absent, not having the management of the vessel, this decision falls in with *Morley v. Gaisford*, 2 H. B. 442; *M'Manus v. Crickett*, 1 East, 106; *Croft v. Alison*, 4 Barn. & A. 590; and other cases which establish that the master is only liable, in case, for the unskilful and negligent conduct of his *servant*. But another decision of the Court of Common Pleas cannot be distinguished from *Leame v. Bray*, in its facts. In *Rogers v. Imbleton*, the Court of Common Pleas decided that a declaration in case against the defendant, for driving his cart against plaintiff's horse through negligence and inattention, was good on *demurrer*; and a similar declaration in case for running foul of a vessel through carelessness, negligence, and unskilfulness, was, indeed, held good, in the Court of King's Bench, *after verdict*; and this decision was approved of by that court in *Leame v. Bray*, on the ground that the declaration contained no words which showed that the injury arose from any force done by the defendants themselves.

Leame v. Bray, 3 East, R. 593; *Cowell v. Laming*, 1 Camp. 497; *Huggett v. Montgomery*, 2 New R. 446; *Rogers v. Imbleton*, 2 New R. 117; *Ogle v. Barnes*, 8 Term R. 188.

In a late instance, where an action on the case was brought against three defendants for so carelessly managing their coach and horses that the coach ran against the plaintiff and broke his leg, and it appeared that one of the defendants (who were co-proprietors,) was driving, and the jury found that the accident arose from his *negligence*, the Court of King's Bench held, that the action on the case well lay, though the plaintiff might perhaps have brought trespass against the defendant who was driving. The court said that the plaintiff had a clear right to sue all the defendants, and that trespass would not lie against them all, as the others were not co-trespassers with him that drove the coach. And Bayley, J., said that the court held in *Leame v. Bray*, that trespass was maintainable in such a case, *but they*

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did not decide that an action on the case would have been improper. The court also recognised the authority of *Rogers v. Imbleton*, and *Ogle v. Barnes*, without impugning that of *Leame v. Bray*. It would seem, therefore, to result from all the cases, and from the language of the judges in *Moreton v. Hardern*, that where an injury occasioned by the defendant's carriage or horses arises from mere negligence without wilfulness, although the force occasioning the injury be immediate, an action on the case is maintainable, as well as an action of trespass.(a) But where the injury is not only immediate, but *wilful*, there trespass seems the sole remedy.

Moreton v. Hardern, 4 Barn. & C. 223; S. C. 6 Dow. & Reg. 275. (a) That where an actual damage is sustained, the trespass may be waived, and an action brought on the special circumstances of the case. See *Pitts v. Gaince*, 1 Salk. 10; *Branscomb v. Bridges*, 1 Barn. & C. 145; *Bishop v. Montague*, Cro. Eliz. 824; and see 4 Barn. & C. 228.

An action of trespass does not lie for making an excessive distress, in case there were a right to distrain, the remedy being an action upon the statute of Marlbridge. But, if there were no right to distrain, an action of trespass lies.(b)

Sayer, 184, *Moir v. Munday*. [(b) Whether the action for an excessive distress shall be upon the statute, or an action of trespass, does not depend merely upon the right to distrain. If the things distrained are of a known determinate value, so that the distress appears upon the face of the pleadings to be excessive, there, notwithstanding the distrainer had a clear right to distrain, trespass may be brought. If, on the other hand, they are of arbitrary and uncertain value, the action must be upon the statute. 1 Burr. 591.] ¶ But in this case the distress was of gold and silver, which are of a certain known value; and Lord Mansfield says, that case was an *exception* to the general rule; so that it may well be doubted whether trespass will lie for any distress of chattels, however excessive, where there is a right to distrain; see 7 Term R. 658; unless, indeed, there be an expulsion, or some other distinct additional trespass. *Etherton v. Popplewell*, 1 East, R. 139.¶

[If a man put cattle, which he has distrained *damage-feasant*, into a pound which happens to be in another county; this does not make him a trespasser, but only subjects him to the penalty in the statute of 1 & 2 Ph. & Mar. c. 12.

Gimbart v. Pelah, 2 Stra. 1272.

A trespass must be certain, and an injury to the party, or not so, at the time the act is done. Trespass therefore will not lie, except perhaps in certain cases, for the arrest of privileged persons; because the allowing or disallowing of privileges is discretionary in the court, and it would be to make the nature of the act depend upon their subsequent judgment. So, the original taking of a ship as prize is not a trespass at common law; and therefore a sentence of the Admiralty, pronouncing a ship not to be prize, cannot alter the nature of the original taking so as to entitle the captured to maintain trespass in the common law courts.

2 Bl. R. 1193; Dougl. 594.]

β Trespass is the proper action against a justice of the peace, who acts alone where two are required, for issuing an execution, and causing the plaintiff's property to be sold, and case does not lie.

Rembert v. Kelly, Harper, 65. See *Kennedy v. Terrill*, Hardin, 490.

So when he has no jurisdiction.

Flack v. Harrington, 1 Breese, 165; *Stewart v. Roberts*, 1 Yerg. 387.

Trespass is the proper remedy for beating a drum in the highway, when a wagon and team are passing, by which the horses are frightened, run away, and injure the wagon.

Loubz v. Hafner, 1 Dev. 185.

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Trespass, and not case, lies where the defendant forcibly entered the door of the plaintiff and took and carried away his goods and chattels.

Collins v. Waggoner, 1 Breese, 26.

Trespass, and not *assumpsit*, is the proper action to recover mesne profits, after a recovery in ejectment.

Poindexter v. Cherry, 4 Yerg. 305.

An officer holding an execution is a trespasser if he break down the doors of a smoke-house, without a previous demand and refusal to open them.

Douglass v. The State, 6 Yerg. 525.

Trespass, and not case, is the proper remedy to recover damages for an injury sustained by the negligent driving of the defendant's horse.

Waldron v. Hopper, 1 Penning. 339; Rappleyer v. Hulse, 7 Halst. 257.

Trespass is the proper action against the master of a vessel for running through a fishing net.

Post v. Munn, 1 South. 61.

When an injury is done by the defendant's dog, in his presence, trespass is the proper remedy; when in his absence, case.

Dilts v. Kinney, 3 Green, 130. See Angus v. Radin, 2 South. 815.

Trespass lies against one for whose benefit a *capias ad satisfaciendum* issued in the name of a dead man, and who approved of the arrest, although he did not order the writ.

Webber v. Kenney, 1 Marsh. 345.

If an overseer directs a slave belonging to his employer to run a horse, and the slave is killed in doing so, trespass lies.

Greer v. Emmerson, 1 Tenn. 13.

In Kentucky, trespass may be maintained for enticing away a slave.

Tyson v. Ewing, 3 J. J. Marsh. 186.

When property taken at sea is claimed as a prize, trespass cannot be sustained, for the question of prize or no prize is to be decided by the Admiralty.

Sonnaire v. Keating, 2 Gallis. 325. But see Miller v. The Resolution, 2 Dall. 1.

Trespass lies against a collector of militia fines, who distrains for a fine imposed by a court-martial on a person not liable to militia duty; the court-martial having no jurisdiction in such case.

Wise v. Withers, 3 Cranch, 331.

Trespass lies against a collector of taxes for imprisoning a party who is not an inhabitant; for the assessors have no right to tax a person not an inhabitant.

Thurston v. Martin, 5 Mason, 497.

Riding after a person, and obliging him to run away into a garden, to avoid being beaten, is an assault.

Martin v. Shoppee, 3 C. & P. 373.

The plaintiff, a sailor, lodged with one of the defendants, an innkeeper, and while in a state of intoxication, the other defendant desired a person to take out what money he had in his pocket, which the other received, and desired that the plaintiff might be told, when he awoke, that his money was lost; afterwards he was told all was right, and he desired 1*l.* of it to

(A) In what Cases an Action of Trespass lies, &c.

be given to a woman, which was done, and the next morning the landlord offered him a small balance, after deducting his demand for lodgings, &c. Held, that the person directing the money to be taken, and the other who took advantage of it as soon as done, were jointly liable in trespass, and the plaintiff was entitled to recover the whole sum taken, *minus* the 1*l.* directed to be given to the woman.

Peddell v. Rutter, 8 C. & P. 337.

Trespass will not lie by the owner of real estate against a person committing waste by permission of a tenant at will.

Daniel v. Pond, 21 Pick. 367.

Nor in favour of a reversioner against a person committing waste by authority of tenant in dower.

Shattuck v. Cragg, 21 Pick. 88. See 8 Mass. 411.

After entry on a tenant at suffrance, the owner may have trespass *quare clausum fregit* against him.

Durell v. Johnson, 17 Pick. 263. See Danforth v. Sargeant, 14 Mass. 491; Rising v. Stannard, 17 Mass. 282; Mayo v. Fletcher, 14 Mass. 525.

Until entry, a person disseised cannot maintain trespass.

Bigelow v. Jones, 10 Pick. 161; Allen v. Thayer, 17 Mass. 199; Blood v. Wood, 1 Metc. 528.

The owner of land over which a road passes may have trespass, as if he was absolute owner, for illegal acts affecting his limited interest.

Robbins v. Borman, 1 Pick. 122; Adams v. Emmerson, 6 Pick. 57; Perley v. Chandler, 6 Mass. 454. See O'Linda v. Lothrop, 21 Pick. 292; Mayhew v. Norton, 17 Pick. 357.

The defendant had a right of way over the plaintiff's close to and from a close beyond; held, that he committed a trespass by using it to go to and from that close and a close still further on.

Davenport v. Lamson, 21 Pick. 72.

Trespass will not lie for the destruction of a pew by pulling down the meeting-house, in order to rebuild it, by order of the parish.

Daniel v. Wood, 1 Pick. 102.

The owner of the sea-shore may maintain trespass against a stranger, for taking away property wrecked on the shore.

Barker v. Bates, 13 Pick. 255.

Trespass lies for taking a deed from a mere depositary, with his consent, but in order to cancel it.

North Bridgewater v. Howard, 16 Pick. 206.

It lies for an injury sustained by frightening the plaintiff's horse, by firing a gun, if there was reasonable ground to think that the firing might frighten him.

Cole v. Fisher, 11 Mass. 137.

Tortious acts, by which no damage has been inflicted on another, do not authorize an action.

Innis v. Crummin, 1 Mart. N. S. 560. See Ham. N. P. 164, 168; Bouv. L. D. *Trespass*.

Where an act not wilful, but the result of carelessness and negligence, is the immediate and direct cause of the injury, trespass *vi et armis* is the proper remedy.

Percival v. Hickey, 18 Johns. 257. See Bullock v. Babcock, 3 Wend. 391.

(B) Where a Party becomes a Trespasser *ab initio*.

The person first attacked in a personal rencontre is not entitled to maintain an action for assault and battery, if he uses such personal violence towards the other as to exceed the bounds of self-defence, and such as could not be justified under a plea of *son assault demesne*, were he the defendant in the suit.

Elliott v. Brown, 2 Wend. 497.

Although a master of a vessel may inflict moderate correction on a seaman for cause, yet if he exceed the bounds of moderation, he will be liable in trespass.

Brown v. Howard, 14 Johns. 119. See Bouv. L. D. *Correction*.g

(B) In what Cases an Action of Trespass lies for an Act which, although it was in the first Instance lawful, becomes afterwards a Trespass *ab initio*.

It has been shown under the last head, that an injury which has been received from an act which was in the first instance lawful (a) is not a trespass.

[(a) See vide *suprà*.]

But in some cases an act which was in the first instance lawful becomes afterwards a trespass *ab initio*.

[See Com. Dig. *Trespass*, (C) 2.]

Wherever the person, who at first acted with propriety under an authority or license given by law, afterwards abuses the authority or license, he becomes a trespasser *ab initio*.

{9 East, 303, 304, Phillips v. Bacon.}

If J S, who has distrained a beast damage-feasant, afterwards kill or use the beast, he becomes a trespasser *ab initio*. He had, by law, an authority to distrain the beast; but, as this extended only to the keeping of it as a pledge, in order to enforce the making of satisfaction for the damage, the killing or using of the beast was an abuse of the authority.

8 Rep. 146, The Six Carpenters' case; Bro. *Tresp.* pl. 29, pl. 273, pl. 350; [Dye v. Leatherdale, 3 Wils. 20.]

But every intermeddling with the thing distrained does not amount to such an abuse of the authority to distrain as to make the distrainer a trespasser *ab initio*.

β An officer does not become a trespasser *ab initio* by a negative abuse of his authority under an execution, as omitting to sell property taken for any length of time. But for a positive act of misfeasance, in such case, he will become a trespasser *ab initio*.

Bell v. North, 4 Lit. R. 134.

In Kentucky, trespass lies against one who takes up an estray, and uses it before it has been posted; for he shall be understood to have acted under the authority of law, and any subsequent abuse of that authority makes him a trespasser *ab initio*.

Barrett v. Lightfoot, 1 Monroe, 242.g

If a man who has distrained armour, scour it, in order to preserve it from rust, he does not become a trespasser *ab initio*; for this, far from being injurious, is beneficial to the owner.

Cro. Eliz. 783, Duncomb v. Reeve.

But if a man, after having distrained raw hides, tan them, he becomes, notwithstanding they would otherwise have rotted, a trespasser *ab initio*;

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because this, however it may at first sight seem to be a benefit, is an injury to the owner; for he can never be sure of having his own hides again, the nature of them being so changed by the tanning that they cannot be known.

Cro. Eliz. 783, *Duncomb v. Reeve*.

A constable, who had the warrant of a justice of the peace to search the house of J S for stolen goods, pulled down the clothes of a bed in which there was a woman, and attempted to search under her shift. It was holden that, by this indecent abuse of his authority, he became a trespasser *ab initio*.

Clayt. 44, *Ward's case*.

The law gives every man a license of going into an inn at seasonable times: yet if a man, who goes lawfully into an inn, be afterwards guilty of an injurious act therein, he becomes a trespasser *ab initio*; because this is an abuse of the license.

8 Rep. 146, *The Six Carpenters' case*; Bro. *Tresp.* pl. 359.

By the 11 Geo. 2, c. 19, § 19, it is enacted, "That where any distress shall be made for any rent justly due, and any unlawful act shall be afterwards done by the party distraining, or by his agent, the distress shall not be therefore deemed unlawful, nor the party making it a trespasser *ab initio*."

||But the party aggrieved by such unlawful act or irregularity shall recover satisfaction for the special damage in an action of trespass, or on the case, at his election. The party, however, must elect the form of action, not arbitrarily, but according to the nature of the injury: *trespass* if the injury be forcible and immediate; *case*, if it be only a consequential damage resulting from the defendant's conduct. Where the defendant, in making a distress, remained on the premises many days beyond the time allowed by law, and during the four last days was *removing* the goods distrained, it was held that, at any rate, he was liable in trespass for continuing on the premises and disturbing the plaintiff in his possession beyond the time allowed by law.

Vide 1 East, 139, and tit. *Distress*, (D); Bradby on Distress, 187, (2d ed.); *Winterbourne v. Morgan*, 11 East, 395.||

By the 17 Geo. 2, c. 38, § 8, it is enacted, "That where any distress shall be made by an overseer, by virtue of a warrant of distress, for any money justly due for the relief of the poor, the party distraining shall not be deemed a trespasser *ab initio* on the account of any irregularity done by such party."

It is in the general true, that a man, who has been only guilty of a negative abuse of an authority or license given by law, does not thereby become a trespasser *ab initio*; because he has only been guilty of a non-feasance.

If J S, who has distrained a beast damage-feasant, refuse to deliver it upon a tender of amends before the impounding thereof, this is a negative abuse of the authority given by law to distrain; and the owner of the beast may recover damages for the detention: but as the injury arises from a non-feasance, (a) J S does not become a trespasser *ab initio*.

8 Rep. 146, *The Six Carpenters' case*; *Ld. Raym.* 188. ||(a) *Qu.* Whether a party can become a trespasser by the mere *continuance* of an unlawful act? *Semble* that he may. See judgment of Bayley, J., 11 East, 404, and 1 Stark. Ca. 22.||

If a man, who went lawfully into an inn, refuse to pay for the liquor he

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has called for, this is a negative abuse of a license given by law to go into an inn, but the man does not become a trespasser *ab initio*.

8 Rep. 146, The Six Carpenters' case.

{So an officer, who levies money under a warrant of distress, does not become a trespasser *ab initio* by not paying over the surplus to the debtor.

Willes, 636, *Moyse v. Cocksedge*; 1 Ld. Raym. 188.}

But in some cases a man who has been only guilty of a negative abuse of an authority or license given by law does become a trespasser *ab initio*.

If a sheriff have not returned a writ which ought to have been returned, he becomes, although this be only a non-feasance, a trespasser *ab initio*, as to every thing which has been done under the writ.

Bro. *Faux Impr.* pl. 5, pl. 7, pl. 12, pl. 23; 1 Jon. 378; Salk. 409; Ld. Raym. 632; Cro. Car. 446. ||But see observations of Bayley and Holroyd, Js., 5 Barn. & C. 488.||

If a bailiff have, by virtue of a warrant from a sheriff, executed a writ which ought to have been returned, he does not, although the writ has not been returned, become a trespasser *ab initio*: for it would be unreasonable to punish the bailiff for the default of returning the writ, which could only be returned by the sheriff.

Bro. *Faux Impr.* pl. 5, pl. 22; 1 Jon. 378; Cro. Car. 446.

But if the bailiff of an inferior court have not returned a writ which ought to have been returned, he becomes a trespasser *ab initio*, as to every thing which has been done under it: because he is the principal officer, and not, as in the case of a bailiff acting under a warrant from a sheriff, a subordinate one; and consequently, it was his duty to return the writ.

2 Roll. Abr. 563, pl. 18; Ld. Raym. 632.

[If goods are attached under process of an inferior court, the officer cannot legally continue in possession of the defendant's house, or keep the goods therein for a long or unreasonable time; but must remove them to a place of safe custody; else he is a trespasser *ab initio*.

Reed v. Harrison, 2 Bl. Rep. 1218.]

||If a sheriff continue in possession after the return of a writ of *fieri facias*, he becomes a trespasser *ab initio*. But not by demanding and receiving more than he is authorized to levy.

Aitkenhead v. Blades, 5 Taunt. 198; *Shorland v. Govett*, 5 Barn. & C. 485.||

The person who is guilty of an abuse of authority in fact does not thereby become a trespasser *ab initio*.

If the bailee of a beast which was delivered to him to be kept, kill or use it, he is liable to make satisfaction for the abuse of the authority given by the owner of the beast; but he does not thereby become a trespasser *ab initio*.

Bro. *Tresp.* pl. 295, pl. 327; Bro. *Act. sur le Case*, pl. 99.

If a beast, which has been distrained for a rent-charge, be killed or used by the distrainer, he does not become a trespasser *ab initio*; because the distress must, in this case, be made under an authority in fact; for an authority to distrain is not incidental to a rent-charge, as it is to a rent-service, but must always have been given by the grantor thereof.

1 Inst. 142, 143; Perk. § 691.

The reason of the difference between the case of an abuse of an authority in fact, and that of an abuse of an authority given by law, is in one book said to be, that the abuse in the latter case is deemed a trespass *ab initio*; because the law intends, from the subsequent tortious act, that there was

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from the beginning a design to be guilty of an abuse of the authority. But this reason, which applies equally to both cases, is by no means conclusive: for it may be as well intended, in the case of an authority in fact, from the subsequent tortious act, that there was from the beginning a design of being guilty of an abuse thereof. Perhaps the difference between the two cases may be better accounted for in the following manner: in the one, where the law has given an authority, it seems reasonable that the law should, in order to secure such persons as are the objects thereof from abuse of the authority, when it is abused, make every thing done void; and leave the abuser in the same situation as if he had done every thing without any authority. And this agrees with the maxim *actus legis nemini facit injuriam*. In the other case, where a man, who was under no necessity of giving an authority to any person, has thought proper to give an authority to a certain person, and this person is guilty of an abuse of the authority, there is no reason that the law should interpose, so as to make every thing done under it void; because it was his own folly to trust a person with an authority who has shown himself not fit to be trusted therewith. The interposition of the law in such case would, moreover, be contrary to the maxim, *vigilantibus non dormientibus servit lex*.

8 Rep. 146, The Six Carpenters' case.

§ The landlord of a tenant at will may peaceably enter the premises, but an illegal search for stolen goods renders him a trespasser *ab initio*.

Faulkner v. Alderson, Gilm. 221.

An officer having made a lawful levy, can be rendered a trespasser *ab initio* by a subsequent act of trespass, but not by an omission or neglect of duty.

Waterbury v. Lockwood, 4 Day, 257.

Omitting to give an impounded beast reasonable food and water will make the field-driver a trespasser *ab initio*.

Adams v. Adams, 13 Pick. 384.

Selling an article under process of law, before or after the time prescribed by law, will make a trespasser *ab initio*.

Smith v. Gates, 21 Pick. 55; Peirce v. Benjamin, 14 Pick. 356; Purrington v. Loring, 7 Mass. 388.

Abuse of a license in fact will not make a person a trespasser *ab initio*.

Cushing v. Adams, 18 Pick. 110.

It seems that working an estray will cause a person to become a trespasser *ab initio*.

Gibbs v. Chase, 10 Mass. 125; Nelson v. Merriam, 4 Pick. 249. See as to what will make a trespasser *ab initio*, Brightman v. Grinnell, 9 Pick. 14; Oystead v. Shed, 12 Mass. 506; Mellville v. Brown, 15 Mass. 82; Walker v. Fitts, 24 Pick. 191.

Where property is seized for a violation of a city ordinance, although the seizure is lawful in the commencement, yet if the city authorities fail to pursue the requisites of the law in advertising and disposing of it, the acts of the officer in making the seizure will be considered as a trespass *ab initio*, for which the city is responsible.

Baumgard v. Mayor, 9 Louis. R. 123.

A mere non-feasance will not make a trespasser *ab initio*.

Gardner v. Campbell, 15 Johns. 401; Hall v. Clark, 19 Wend. 498.

When one enters the house of another by license, and, after entry, commits an unlawful act, he is a trespasser *ab initio*.

Allen v. Crofoot, 5 Wend. 506; Adams v. Freeman, 12 Johns. 408. g

(C) By whom an Action of Trespass may be brought.

1. *Where the Injury was done to a Person.*

ONLY the person to whom the injury was done can maintain an action of trespass for a personal injury.

If a son or daughter have been falsely imprisoned, neither the father nor the mother can maintain an action of trespass.

Cro. Eliz. 770, *Barham v. Dennis*.

If a daughter have been debauched, her father may maintain an action of trespass: (a) but he can only recover damages for the loss of the daughter's service; (b) no damages being recoverable by him for the personal injury done to the daughter.

Sid. 225, *Sippora v. Basset*; Clayt. 133. [(a) In *Bennett v. Alcott*, 2 Term R. 166, it is said that an action merely for debauching a man's daughter, by which he loses her service, is an action on the case; but that, according to Lord C. J. Holt's opinion, where the offence is accompanied with an illegal entry of the father's house, he has his election to bring either trespass or case. However, in Lord Raymond, 1032, (the authority referred to,) the distinctions taken seem to be, not between trespass and case, but different forms of trespass and assault. In *Tullidge v. Wade*, 3 Wils. 18, 19, the action was trespass, and no entry of the house, 3 Wooddes. 245, note.] ¶ It is now settled that the action for battery of a servant, or seduction of a daughter, is, in form, an action of trespass; at least so far that it may be joined with other counts in trespass. *Woodward v. Walton*, 2 New R. 476; *Ditcham v. Bond*, 2 Maule & S. 436. The gist of the action, however, is the loss of service, and it may be framed in case with a *quod cum*, 2 Term R. 167; 5 East, 45; and any damages entitle the plaintiff to full costs, as in actions on the case. *Batchelor v. Biggs*, Black. R. 854. So, in *Cook v. Sayer*, B. N. P. 28 a; Burr. R. 753, it was held (in the strictly analogous action of crim. con.) that the limitation to the action was six years; and this plea was also held good on general demurrer in *Macfadzen v. Olivant*, 6 East, 387; but the court did not decide whether four years or six was the proper limitation, since the plea there in substance included both, and the demurrer being general, the objection of form could not be taken. (b) *Sed vide* *Maunder v. Venn*, Moo. & Malk. Ca. 323, *contra*; but see *Hall v. Hollander*, 4 Barn. & C. 660; *Harper v. Luffkin*, 7 Barn. and C. 387. ¶ An action of trespass will lie by the father of a debauched daughter, though the act of seduction was not committed at the father's house, but at the house of the daughter's sister. *Wallace v. Clark*, 2 Tenn. 93. But when the woman is over twenty-one years of age, unless she be his servant, no action lies. *Thompson v. Miller*, 1 Wend. 447; *Nicholson v. Stryker*, 10 Johns. 115.

An ancestor, before tenure by knight-service was taken away, could have maintained an action of trespass for the taking away of his heir: but he could only have recovered damages for the loss of the marriage of the heir; no damages being recoverable by him for the personal injury done to the heir.

3 Rep. 39, *Ratcliff's case*; 2 Wms. 116, 128; Cro. Eliz. 770.

If a servant have been beaten, no one except himself can maintain an action of trespass for the injury done to his person. And although a master may, where his servant, lawfully retained, has been beaten, maintain this action, he cannot recover any damages for the personal injury done to the servant; for his recovery can only be for the consequential damages he has sustained by the servant's having been rendered, by the beating, incapable, or less capable, to perform his service.

Bro. *Tresp.* pl. 131; 2 Roll. Abr. 552, N. pl. 7; Bro. *Lab.* pl. 29; Bro. *Tresp.* pl. 131; 2 Roll. Abr. 552, N. pl. 7.

[Trespass lies at the suit of a master for enticing away a servant from his actual service.

Hart v. Aldridge, Cowp. 54.] ¶ No objection was made in this case to the form of the action: but case is the more usual remedy. And according to Broke Abr. tit.

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Labourers, pl. 21, trespass *vi et armis* only lies for *taking* a servant from his master, (which means a forcible taking,) and case is the remedy for enticing him to depart; and see Lord Raym. 1116.||

If a wife have been falsely imprisoned, her husband may, in an action of trespass, obtain satisfaction for the damages he has sustained, by having been deprived of the company and comfort of his wife, and by the business of his house having been neglected during her absence: but he cannot recover any damages for the personal injury done to the wife. It is indeed true, the husband must always join with a married woman in an action of trespass for a personal injury done to herself: but, as this is owing to the incapacity of a married woman to sue alone, unless she be entitled by special custom so to do, or unless her husband become incapable of suing, it is by no means to be considered as an exception to the general rule, that only the person to whom the injury was done can maintain an action of trespass for the personal injury.

Salk. 119, Russel v. Corne; Cro. Ja. 502; Cro. Car. 90; Ld. Raym. 1032.

[A husband may maintain trespass for an adulterous intercourse with his wife, force and violence being supposed in law to accompany this atrocious injury.

7 Mod. 81; 2 Salk. 552.] {See 5 Term, 357; 6 East, 244; Ibid. 387, M'Fadzen v. Olivant; 5 Bos. & Pul. 476, Woodward v. Walton; *ante*, Vol. i. p. 126.} ||Vide 6 East, 387; 2 New R. 482; 2 Maul. & S. 436, and note *supra*.||

{It has been decided that this action will not lie for an act of adultery committed after the husband and wife have been separated by deed; for the gist of the action is not the criminal act, but the loss by the plaintiff of the comfort and society of his wife, and no such loss can be sustained by one who has voluntarily relinquished his wife.

5 Term, 357, Weedon v. Timbrell. Vide 6 East, 244, Chambers v. Caulfield.}

β A father may maintain an action of trespass for the seduction of his daughter, who was a married woman, but living with him as his servant, being separated from her husband.

Hooper v. Luffkin, 7 B. & C. 387; S. C., 1 M. & R. 166. See Thompson v. Miller, 1 Wend. 447.

A widow bound her daughter apprentice, and while in that situation the daughter was seduced, upon which the indentures were cancelled by consent, and the daughter returned to the mother's house, and lay in there; held, that an action brought by the mother, under these circumstances, for the seduction, could be maintained.

Sergeant v. ———, 5 Cowen, 106. See Martin v. Payne, 9 Johns. 387.

A father cannot support an action for debauching his daughter, where he has connived at the unlawful intercourse.

Seager v. Sligerland, 2 Caines, 219; Fletcher v. Randall, Anth. N. P. 196.

In general, the plaintiff has his election to bring trespass or case for debauching his daughter or servant.

Moran v. Dawes, 4 Cowen, 412.γ

2. Where the Injury was done to Personal Property.

The person in whom the general property in a personal chattel is, may maintain an action of trespass for the taking or injuring of the chattel by a stranger, although he have never had a possession thereof in fact: for a general property always draws to it a possession in law; which is, in the

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case of a personal chattel, by reason of the transitoriness of its nature, sufficient to found this action upon.

Bro. *Tresp.* pl. 303, pl. 346; Latch, 214; 2 Bulstr. 268.

||Where an outgone tenant covenants with his landlord to leave the manure on the farm, to be taken by an incoming tenant at a valuation, the property and possession in the manure remain in him till valuation; and if the incoming tenant remove and use it before, he is answerable in trespass to the outgone tenant.

Beaty v. Gibbons, 16 East, R. 116.||

[To entitle a man to bring trespass, he must, *at the time* when the act was done which constitutes the trespass, either have the *actual possession* in him of the thing which is the object of the trespass, or he must have a *constructive possession*, in respect of the right being vested in him. Therefore the lord may, before seizure, maintain trespass for an estray or wreck taken by a stranger. For the *right* is in the lord, and a *constructive possession* in respect of the thing being within the manor of which he is lord. So, the executor has the *right* immediately on the death of the testator, and the right draws after it a *constructive possession*. The probate is a mere ceremony; for, when passed, the executor does not derive his right under the probate, but under the will; the probate is only evidence of his right, and is necessary to enable him to sue; but he may release, &c., before probate. But there seems to be no instance where a man, who has a new right given to him, which, from reasons of policy, is so far made to relate back as to avoid all mesne encumbrances, shall be taken to have such a possession as to bring trespass for an act done before such right was given to him. Hence trespass will not lie by the assignees of a bankrupt against a sheriff for taking the goods of the bankrupt in execution after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sell them after the issuing of the commission, and after a provisional assignment and notice from the provisional assignee not to sell them.(a)

1 Term R. 480, *per* Ashhurst, J. β Constructive possession is sufficient. Bulkley v. Dolbeare, 9 Conn. 232. See *post*, *Trespass*, C. 3; Bird v. Clark, 3 Day, 272. γ (a) Smith v. Milles, 1 Term R. 475.] ||Trover in such case is the proper remedy, since the sale was wrongful though the original taking was lawful. Cooper v. Chitty, Black. R. 65; 1 Kenyon R. 393.||

If the owner of goods, which are at York, give them to J S, who at the time of the gift is in London, and before J S have obtained the actual possession of the goods a stranger take them, J S may maintain an action of trespass against the stranger; for by the gift he acquired a general property in the goods.

Bro. *Tresp.* pl. 303; Latch. 214.

But if the bailee of goods have given them to J S, and a stranger take them before they are delivered to J S, this action cannot be maintained by J S, because by this gift, it being the gift of a person who had only a special property in the goods, J S did not, as they were not delivered to him, acquire any property in them.

Bro. *Tresp.* pl. 216.

If the goods of a testator, who has appointed an executor, are taken by a stranger before the testator's will is proved, and afterwards the executor proves the will, he may maintain an action of trespass for the taking of them: for, although an executor has not any property in the goods of his

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testator until he has proved his will, yet, when this is done, he acquires a general property therein from the time of the death of his testator.

2 Bulst. 268, *Fisher v. Young*.

If a testator have bequeathed certain specific goods to J S, the legatee may bring an action of trespass for an injury done to the goods by a stranger, although the injury was done before they were delivered to him by the executor: because the legatee did, immediately upon the testator's death, acquire a general property in the goods.

Bro. *Tresp.* pl. 25.

But if a testator have bequeathed a third part of his goods to J S, and some of the testator's goods, before the third part thereof was delivered to J S by his executor, be taken by a stranger, the legatee cannot maintain this action; because he does not, in this case, acquire a property in any of the testator's goods until they are delivered to him by the executor.

Bro. *Tresp.* pl. 25.

If wrecked goods are thrown on shore, and, before a seizure thereof is made, a stranger take them away, the person in whom the right of wreck is may maintain an action of trespass; inasmuch as a general property in the goods was, immediately upon their being thrown on shore, vested in him.

Fitz. N. B. 91.

||If a ship become forfeited under the navigation laws, and is seized as forfeited, the owner cannot maintain trespass against the party seizing, although he do not proceed to condemnation: for by the forfeiture the property is divested out of the owner.

Wilkins v. Despard, 5 Term R. 112.||

[Where the vendor sold goods by sample to be delivered to the vendee within a month, and took earnest, and within that time sent the goods by his servant to the vendee's house, where part being unloaded, the rest were distrained for toll, the delivery was complete, so as to entitle the vendee to bring trespass for the seizure. For here was an actual, not a constructive possession; though, had part not been lodged in the vendee's house, yet the delivery was complete as to all honest purposes, in respect of third persons, the moment the vendor had delivered the goods to his servant to carry them to the vendee.

Blakey v. Dinsdale, Cowp. 661.]

Every person, in whom the general property in a personal chattel is, may maintain an action of trespass for the taking or injuring thereof by a stranger, although the trespass was committed whilst the chattel was in the possession of another who had a special property therein.

2 Roll. Abr. 569, (P), pl. 5; Sid. 438.

If the goods of J S, which were bailed to J N, are taken from or injured in the hands of J N by a stranger, J S, in whom the general property still remains, may maintain an action of trespass.(a)

2 Roll. Abr. 569, (P), pl. 5. ||(a) The two last propositions require some qualification. Whether the general owner can maintain trespass for the taking or injury of a chattel while in the hands of a bailee or person having a special property, depends on the question, whether such owner has the constructive possession. If the bailee has a right of possession for any time, however inconsiderable, to the exclusion of the owner, such owner cannot maintain trespass. Therefore, where furniture of the landlord let with a house was taken under an execution against the tenant, it was held that

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the landlord could not maintain trespass against the sheriff, for he had not the constructive possession. *Ward v. Macauley*, 4 Term R. 489; and, as he has not the right to the possession, trover lies not in such case. *Gordon v. Harper*, 7 Term R. 9; and see 15 East, 607; *Ry. & Moo. Ca.* 99. So also where the owner of a horse let him for hire for a certain time, during which he was killed by the owner of a cart driving it against him, Lord Ellenborough, C. J., held, that the owner could not maintain trespass, since he had not the possession, or the right to possession, of the horse, but that his remedy was by action on the case for the injury to his reversionary interest. *Hall v. Pickard*, 3 Campb. 187. But where the bailment is merely *gratuitous*, the legal possession remains in the owner, and he may maintain trespass. *Lotan v. Cross*, 2 Ibid. 464.¶

But if the bailee of goods have delivered them to a stranger, the bailor cannot maintain this action; because the general property in the goods is changed by the delivery of a person who had a special property therein.

Bro. *Tresp.* pl. 216, pl. 295.

Every person, who is answerable to another for a personal chattel in his possession, has such a special property in the chattel as enables him to maintain an action of trespass for the taking or injuring thereof by a stranger.(a)

Fitz. N. B. 89, 92; 1 *Inst.* 89; Bro. *Tresp.* pl. 83; 4 *Rep.* 84; 13 *Rep.* 69; 2 *Roll. Abr.* 569, pl. 5, pl. 7; *Sid.* 438; 2 *Saund.* 47. ¶(a) This is the case even with a gratuitous bailee of a chattel, for he is accountable for gross negligence. *Rooth v. Wilson*, 1 *Barn. & A.* 59.¶

This distinction was formerly taken; namely, that if goods which have been delivered generally to a man to be kept, are taken from him by a stranger, the bailee may maintain an action of trespass, because he is answerable for the goods to the owner: but that if goods, which have been delivered to a man to be kept as he keeps his own, are taken by a stranger, the bailee cannot maintain this action; because he is not answerable for the goods to the owner. But in a modern case, in which *Southcote's* case and all the old cases were considered, this distinction is exploded. It is in this case laid down, that the bailee of goods which have been delivered to be kept, is not, although the delivery were general, answerable to the owner for the goods, unless they are lost or injured by neglect or default of the bailee; for that it would be very unreasonable to make a man, who receives no benefit from keeping the goods of another, answerable for the taking or injuring thereof, unless he have been guilty of neglect or default. It seems to follow from this case, that the bailee of goods, when delivered generally to be kept, cannot maintain an action of trespass for the taking or injuring of them by a stranger.(b)

4 *Rep.* 84, *Southcote's* case; *Ld. Raym.* 913, 914, 915, *Coggs v. Barnard*. ¶(b) But see *Rooth v. Wilson*, 1 *Barn. & A.* 59.¶

If J S have bailed a beast to J N for ploughing his land, and this beast be taken from J N by a stranger, J N may maintain this action; because, as the beast was delivered to J N for a purpose beneficial to himself, he is answerable for it to the owner.

Bro. *Tresp.* pl. 92; *Ld. Raym.* 913, 915.

If goods, which have been taken by a sheriff in execution, are taken from him by a stranger, he may maintain an action of trespass; because he is answerable for the goods to the person at whose suit the execution was. *Sid.* 438, *Wilbraham v. Snow*; 1 *Mod.* 31; ¶*sed vide* 1 *Maul. & S.* 711.¶ A constable who has levied on goods, may maintain trespass against any one who afterwards takes them away. *Casher v. Peterson*, 1 *South.* 317.¶

If goods of J S, which have been delivered to J N to be carried for hire,

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are taken from J N by a stranger, J N may maintain an action of trespass ; because he is answerable for the goods to J S.

Salk. 26, 143 ; 2 Rep. 84 ; 1 Mod. 31.

The agistor of a beast may maintain an action of trespass for the taking or injuring thereof by a stranger, whilst it is upon his land, because he is answerable for the beast to the owner.

Bro. *Tresp.* pl. 67 ; Moor, 354.

¶ And where the gratuitous bailee of a horse turned it out after dark into a pasture separated from a field by a fence which the owner of the field was bound to repair, and the horse, owing to the bad state of the fence, fell from one field into the other and was killed, it was held that the bailee might maintain an action on the case against the owner of the field for not repairing his fence, since the bailee, by his own negligent care of the horse, had become responsible to its owner.

Rooth v. Wilson, 1 Barn. & A. 59.¶

Churchwardens may maintain an action of trespass for the taking of goods belonging to their church by a stranger during their churchwardenship ; because they are answerable for the goods to their successors. And it is said, that churchwardens may maintain this action for the taking of goods belonging to their church by a stranger during the churchwardenship of their predecessors. But it may be inferred from what is said in another book, that churchwardens cannot maintain this action, for the taking of goods belonging to their church by a stranger during the churchwardenship of their predecessors. And the latter seems to be the better opinion ; for it is not reasonable that churchwardens should be answerable to their successors for goods belonging to their church, which were taken during the churchwardenship of their predecessors. It is moreover certain, that the churchwardens never had in this case an actual possession of the goods. It follows, that they never had a special property in the goods ; for it is laid down in many cases, that no person can have a special property in a personal chattel of which he never had the actual possession.

Fitz. N. B. 92 ; 1 Ventr. 89 ; 1 Mod. 65 ; Fitz. N. B. 89, 92 ; ¶ 2 Will. Saund. 47.¶ Dyer, 48.

It is upon the whole clear, that both the person in whom the general property is, and the person in whom the special property is, may maintain an action of trespass for the taking or injuring of a personal chattel by a stranger, whilst it was in the actual possession of the latter.

¶ *Sed vide* note (a), p. 455.¶

But if either of these persons have recovered in such action, this shall oust the other of his right of action ; otherwise the trespasser would be liable to make a second satisfaction for the same injury.

2 Roll. Abr. 569, (P), pl. 4.

Nor is this case like the case of the beating of a servant, in which both the servant and his master may maintain an action of trespass ; and the recovery of one shall not oust the other of his right of action. For the two actions are in the latter case maintained upon quite different grounds ; that of the servant being to recover a satisfaction for the personal injury ; that of the master to recover a satisfaction for the loss of service, which was the consequence of the personal injury.

Bro. *Tresp.* pl. 13 ; 2 Roll. Abr. 552, (N), pl. 7.

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§ The owner of bees, which have been reclaimed, may bring an action of trespass against a person who cuts down a tree into which the bees have entered on the soil of another, destroys the bees, and takes the honey.

Goff v. Kilts, 15 Wend. 550. §

3. Where the Injury was done to Real Property.

Only the person who has the possession in fact of the real property to which an injury has been done, can maintain an action of trespass *quare clausum fregit*; a general property not being, in the case of real property, as it is in the case of personal, sufficient to found this action upon.

Bro. Tresp. pl. 38, pl. 305, pl. 346; 3 Lev. 209; Latch, 263; 2 Bulstr. 268. § Wilber v. Paine, 1 Ohio, 252; Beggs v. Thompson, 2 Ohio, 105; Palmer v. Crosby, 1 Blackf. 141; Ridge v. Wilson, 1 Blackf. 410; Moore v. Crocker, 1 Breese, 18; Waggoner v. Corlew, Cooke, 246; Douling v. Hickman, 4 Hayw. 170; Pearson v. Smith, Conf. Rep. 367; Kennedy v. Wheatley, 2 Hayw. 402; M'Millan v. Haffley, 2 Car. Law Repos. 89; Myrick v. Bishop, 1 Hawks, 485; Foster v. Fletcher, 7 Monroe, 536; Bulkley v. Dolbeare, 9 Conn. 232; Chatham v. Brainerd, 11 Conn. 60; Toby v. Reed, 9 Conn. 216; Wheeler v. Hotchkiss, 10 Conn. 225; Kernion v. Guenon, 7 Mart. N. S. 171; Peylavin v. Winter, 6 Louis. R. 559; Litchworth v. Bartells, 4 Mart. N. S. 136. §

And there must not only be a possession in fact of the real property, but it must be a lawful one: for an intruder into land does not gain by the intrusion such a possession as will enable him to maintain an action of trespass *quare clausum fregit*.

2 Leon. 147, Berry v. Goodman; Plowd. 546; 4 Leon. 184. || Lord Kenyon observes on the case in 4 Leon. 184, that, "it goes upon artificial reasoning that the king cannot be dispossessed by an intruder, and does not apply to other cases." 1 East, 245; and it is now perfectly settled that any possession is sufficient to maintain trespass against a mere wrong-doer, that is, a person who does not show title in himself, or another authorizing him. Parker v. Birbeck, 3 Burr. 1563; Graham v. Peat, 1 East, 244; Chambers v. Donaldson, 11 East, 65; Catteris v. Cowper, 4 Taunt. 547; Dyson v. Collick, 5 Barn. & A. 600; but see Revett v. Brown, 5 Bing. 7. ||

The person in whom the freehold of land is, cannot maintain an action of trespass *quare clausum fregit* for an injury done to the land whilst it was in the possession of another.

Bro. Sur. pl. 50; 2 Roll. Abr. 554; 4 Leon. 184. {1 Johns. Rep. 511, Campbell v. Arnold; 3 Johns. Rep. 468, Tobey v. Webster.}

§ One who rents turpentine boxes, agreeing to give certain part of the turpentine for rent, is not a tenant in possession, and has no interest in the soil; the real owner may bring trespass *quare clausum fregit* for an entry upon the land, and for taking away the turpentine.

Graham v. Houston, 4 Dev. 232. §

An heir at law may make a lease of land descended upon him, before he has entered thereupon; but he cannot maintain an action of trespass *quare clausum fregit*, before he has by entry acquired the possession in fact.

Plowd. 142, Browning v. Beston.

If a fine *sur conusance de droit come ceo* be levied of land, the conusee thereby immediately obtains a possession in law; but he cannot maintain an action of trespass *quare clausum fregit*, before he has by entry acquired the possession in fact.

2 Leon. 147, Berry v. Goodman.

A parson cannot maintain an action of trespass *quare clausum fregit* for

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an injury done to his church, church-yard, or glebe, before he is inducted ; it being the induction which gives him the possession in fact of these things.

Plowd. 528, *Hare v. Bickley* ; || *Bulwer v. Bulwer*, 2 Barn. & A. 470, *acc.*||

||A married woman cannot maintain trespass for breaking and entering her dwelling-house, although her husband have deserted her and gone beyond seas, and she is living and trading as a feme sole.

Boggett v. Frier, 11 East, R. 301.||

If a man, who once had the possession in fact of a real estate, quit it or be deprived thereof, he cannot maintain an action of trespass *quare clausum fregit* for an injury done thereto, which was done betwixt the time of his quitting or being deprived of the possession, and his regaining the same by re-entry.

Bro. *Tresp.* pl. 365.

The disseisee of land cannot maintain an action of trespass *quare clausum fregit* for an injury done thereto betwixt the time of the disseisin and his re-entry ; for he does not, until a re-entry be made, regain the possession in fact of the land.

2 Roll. Abr. 553, (S), pl. 4, pl. 5.

It has been holden, that a lessor at will or for years, of land, who has after the determination of the estate at will or for years re-entered, may maintain an action of trespass *quare clausum fregit* for an injury done to the land during the continuance of the estate at will or for years ; because his reversion may have been thereby injured. But it seems to be the better opinion that he cannot : for in another book it is laid down, that only the lessee at will or for years of land can maintain this action for an injury done to the land during the continuance of the estate at will or for years ; for that the remedy of the lessor, if the injury be of such a kind as to be prejudicial to the reversion, is by an action upon the case.

2 Roll. Abr. 531, (N), pl. 3 ; 3 Lev. 209, *Biddeford v. Onslow*. ||3 Wils. R. 461 ; 7 Term R. 9 ; 1 Maul. & S. 233 ; 3 Camb. 187, *acc.*||

If in a lease for years of land there be a reservation of the trees, the lessor may maintain an action of trespass *quare clausum fregit* for cutting down or injuring the trees during the continuance of the lease : for by the reservation of the trees the land on which they grow was reserved, and consequently the lessor has never been out of the possession in fact thereof.

Bro. *Tresp.* pl. 55. ||Vide *Goodright v. Vivian*, 8 East, R. 190.||

A lessee for years of land may maintain an action of trespass *quare clausum fregit* for an injury done to the land by any person during the continuance of his estate.

2 Roll. Abr. 551, (N), pl. 6 ; Sid. 347. {Possession under a *void* lease is sufficient to maintain trespass against a wrong-doer. 1 East, 244, *Graham v. Peat*.}

But a lessee at will of land can only maintain this action, where the injury to the land, done during the continuance of his estate, was done by a stranger. For if the injury were done by a person who entered under colour of title, this action does not lie.

2 Roll. Abr. 551, (N), pl. 3, pl. 4 ; Sid. 347, *Geary v. Barecroft*.

It is laid down in one book, that a tenant at sufferance of land has not such an interest as enables him to maintain an action of trespass *quare*

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clausum fregit. But it is in other books laid down, that a tenant at sufferance of land may maintain this action for an injury done by a stranger to the land.

Fitzh. *Tresp.* pl. 10; 2 Roll. Abr. 551, (N), pl. 1; 13 Rep. 69. ¶As it is now settled that any possession is sufficient against a wrong-doer, there can be no doubt that a tenant at sufferance may maintain trespass. See 1 East, 246; Burr. 1563; 5 Barn. & A. 600.¶

{But he cannot maintain trespass against his landlord for dispossessing him, and cutting and carrying away his wheat.

1 Johns. Ca. 123, *Wilde v. Cantillon*.}

If the person, who is entitled to the vesture or herbage of land be disturbed in the enjoyment thereof, an action of trespass *quare clausum fregit* (a) lies.

1 Inst. 4; Bro. *Tresp.* pl. 273; 2 Roll. Abr. 552, (N), pl. 8; Moor, 302. [(a) In a late case it was holden, that this action is maintainable by the person who is only in the enjoyment of the vesture of land, or other right, as that of digging and carrying away turf and peat, provided it be a separate and exclusive interest. *Wilson v. Macreth*, 3 Burr. 1824.] ¶So also the purchaser of a growing crop of grass, to be mown and made into hay by himself, has the exclusive possession of the close for a limited purpose, and may maintain trespass *quare clausum fregit* against any person entering it and taking the grass, even with the assent of the owner of the close. *Crosby v. Wadsworth*, 6 East, R. 602; and see 2 Taunt. 38; 5 Term R. 329; *Tompkinson v. Russel*, 9 Price, R. 287.¶

It has been holden, that the person who is entitled to the grass grown upon land after it has been mown may maintain an action of trespass for spoiling the grass; but that he cannot maintain an action of trespass *quare clausum fregit*.

3 Leon. 213, *Hitchcock v. Hervey*; ¶but see the cases in the last note above.¶

It is laid down, that no person can maintain an action of trespass *quare clausum fregit* for an injury done to the soil of a highway; for that, when land is dedicated to the service of the public as a highway, it ceases to be private property. But it was in a modern case holden, that although land be dedicated to the public service as a highway, the property of the soil continues so in the dedicator, that he may maintain this action.

1 Bulstr. 157, *Durand v. Child*; Stra. 1004, *Lade v. Shepherd*, Hil. 8 G. 2. {2 Johns. Rep. 357, *Cortleyou v. Van Brundt*; 2 Mass. T. Rep. 127.} ¶Vide *Harrison v. Parker*, 6 East, 154.¶

¶The contractors for making a navigable canal having, with the permission of the owner of the soil, erected a bank or dam on his land for the purpose of completing their work, have possession sufficient to enable them to maintain trespass against a wrong-doer who breaks it down.

Dyson v. Collick, 5 Barn. & A. 600; and see 1 Barn. & C. 205.

But the commissioners of sewers have not such a property or possessory interest in walls and dams erected by them on navigable rivers, as to enable them to maintain trespass against wrong-doers.

Newcastle v. Clark, 2 Moo. R. 666; and see *Hollis v. Goldfinch*, 1 Barn. & C. 205.¶

A person cannot maintain an action of trespass *quare clausum fregit* for treading down the grass growing upon land in which he has a right of common; for, although a commoner have a right to take such grass by the mouth of his commonable cattle, he is not in the possession of the land.

Bro. *Tresp.* pl. 174; 2 Roll. Abr. 552, (N), pl. 8.

It has been holden, that although J S have a right to a seat in a church

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as belonging to an ancient messuage, he cannot maintain an action of trespass for being disturbed in the use thereof, or for an injury thereto done; for that the proper remedy is an action upon the case.(a)

Palm. 46, *Dawtrie v. Dee*. [(a) The true reason is, that J S has not the exclusive possession; the possession of the church being in the parson. 1 Term R. 420. But, the possession being in the parson, it seems to follow, that this is the proper kind of action, where the parson determines to sue one who has preached in his church without his leave; for such intruder, Lord Holt says, is a trespasser. 12 Mod. 420, 453.] ||Vide 5 Term R. 296; 1 Barn. & A. 498; 5 Ibid. 356; 5 Barn. & C. 1.||

||A grant by a lay impropriator to a person, his heirs, and assigns, of part of the chancel of a church, is not valid in law, and therefore such grantee, or those claiming under him, cannot maintain trespass against a subsequent lay impropriator, who pulls down their pews erected in virtue of the grant.

Clifford v. Wicks, 1 Barn. & A. 498.||

It is not necessary that the person, who brings an action of trespass *quare clausum fregit* for an injury to land, should be in the actual possession thereof at the time of bringing the action.

If an injury were done to the land of J S while he was in the actual possession thereof, and J S afterwards quit the possession, an action of trespass *quare clausum fregit* may be brought by him.

Bro. Tresp. pl. 12; 2 Roll. Abr. 569; Plowd. 431.

The disseisee of land may maintain an action of trespass *quare clausum fregit* for an injury done to the land before he was disseised.

Bro. Tresp. pl. 46; 2 Roll. Abr. 553, (S), pl. 3.

If the beast of A be chased into land which is the property of A, but in the possession of B, A may maintain an action of trespass for the injury done to his beast; but he cannot maintain an action of trespass *quare clausum fregit*.

Bro. Tresp. pl. 421.

Although land in the possession of J S be sown by J N, and it be moreover agreed by J S that J N shall have half the corn thereupon grown, J N cannot join with J S in an action of trespass *quare clausum fregit* for an injury done to the corn before it is severed; because he is not in the possession of the land.

Cro. Eliz. 143, *Hare v. Celey*; 2 Roll. Abr. 568, (N), pl. 2. {But they may join in an action of trespass against a third person for cutting and carrying away the crop. 3 Johns. Rep. 216, *Foot v. Colvin*.}

β If one enters into possession of land, under a treaty of purchase with the owner, he becomes a tenant at will of the owner, and cannot support an action of trespass *quare clausum fregit* against such owner, for entering upon the premises without his consent.

Walton v. File, 1 Dev. & Batt. 567.

Tenants in common cannot maintain trespass against each other, even after a parol partition.

M'Pherson v. Sequine, 3 Dev. 153.

A person in possession may maintain trespass against a stranger,(b) but not against the owner.(c)

(b) *Barnstable v. Thatcher*, 3 Metc. 239; *Shrewsbury v. Smith*, 14 Pick. 297; *Kempton v. Cook*, 4 Pick. 305. (c) 3 Metc. 239.

A tenant in common may maintain trespass against his co-tenant for an actual ouster.

Allen v. Carter, 8 Pick. 175; *Keay v. Goodwin*, 16 Mass. 1.

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A lessor cannot maintain trespass against a sub-tenant of his lessee for a trespass committed during the term.

Tobey v. Webster, 3 Johns. 468.

After recovering possession, a disseisee may maintain trespass against the disseisor or his servants, or a stranger acquiring title from the disseisor.

Morgan v. Varick, 8 Wend. 587.

Whoever has an exclusive right to the soil, as to a crop of wheat growing thereon, may maintain trespass *quare clausum fregit*.

Austin v. Sawyer, 9 Cowen, 39.

If A assign to B all his interest in a crop growing in the land of C, for a trespass committed to it, the action must be brought in the name of B, the assignee, and not in the name of A.

Carter v. Jarvis, 9 Johns. 143.g

(D) For what Injuries to the Person an Action of Trespass lies.

1. For a Battery.

An action of trespass lies for a battery.

But it is not necessary in this place to show what constitutes a battery; because this has been already done under the title "ASSAULT AND BATTERY."

2. For an accidental Stroke.

If one man have received a corporal injury from the voluntary act of another, an action of trespass lies, provided there was a neglect or want of due caution in the person who did the injury, although there were no design to injure.

Bro. *Tresp.* pl. 213, pl. 310; Hob. 134; Latch, 13, 119.

If a soldier, for want of due caution, wound a man by the discharge of his gun in exercising, this does not amount to a battery; because there was no design to hurt: but an action of trespass lies.

Hob. 134, Weaver v. Ward.

The defendant in uncocking his gun discharged the same, and wounded the plaintiff, who was standing by and looking at him: it was holden that an action of trespass lay.

Stra. 596, Underwood v. Hewson; {2 Hen. & Mun. 423, Taylor v. Rainbow, *acc.*}

If a man ride an unruly horse for the purpose of breaking it, in a place much frequented by the king's subjects, and the horse run away with the rider and run over a man and hurt him, an action of trespass lies.

1 Ventr. 295, Anon.

But, if the corporal injury received is not to be imputed to the neglect of the party by whom it was done, or to the want of due caution, an action of trespass does not lie, although it were the consequence of a voluntary act.

||See Wakeman v. Robinson, 1 Bing. R. 213.||

If, in the very instant a soldier discharges his gun in exercising, a person runs across, and is thereby wounded, an action of trespass does not lie.

Hob. 134, Weaver v. Ward.

3. For a false Imprisonment.

An action of trespass lies for every unlawful restraint of liberty.

{If a warrant be shown by the officer to the person charged, who thereupon, without compulsion, attends the officer to the magistrate, and after examination is dismissed, this is not an imprisonment. There was no arrest, but the warrant was used only as a summons.

5 Bos. & Pul. 211, Arrowsmith v. Le Mesurier.}

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If a person be unlawfully arrested in the street, this, although he be not carried into a house, is a false imprisonment.

Finch's Law, 202.

Every arrest of a man for a civil cause, which is not warranted by legal process, is an unlawful restraint of liberty.

2 Inst. 51, 52.

It has been holden, that a custom to imprison a person without legal process is not good.

2 Jon. 147, *Eking v. Newman*.

{A warrant to arrest the party "to the end that he may become bound to appear at the *next sessions*," &c., means the next sessions after the arrest, and not after the date of the warrant. Therefore if the officer execute it after the sessions next ensuing the date, it is not a false imprisonment.

8 Term, 110, *Mayhew v. Parker*.}

If a person be arrested under a process which was irregularly issued, this is a false imprisonment in the party at whose suit it was issued; for it was incumbent on him to take care that the process was regularly issued.

2 Jon. 214; 1 Ventr. 220; Stra. 509. β Case, and not trespass, is the proper remedy for a wrongful act done under a legal process regularly issued by a court of competent jurisdiction. *Luddington v. Peck*, 2 Conn. 700; *Hayden v. Shed*, 11 Mass. 500; *Plummer v. Dennett*, 6 Green, 421; *Watson v. Watson*, 9 Conn. 141; *Turner v. Walker*, 3 Gill & Johns. 377; *M'Hugh v. Pundt*, 1 Bailey, 441; *Brown v. Wood*, 4 Bailey, 457; *Owens v. Starr*, 2 Litt. 234; *Swift v. Chamberlain*, 3 Conn. 537; *Beatty v. Perkins*, 6 Wend. 382; *Gardner v. Neil*, 1 Car. Law Repos. 492. But when the process has issued out of a court having no jurisdiction, or it is irregular, trespass lies. *M'Cool v. M'Cluney*, Harper, 486; *Kennedy v. Terrill*, Hardin, 490; *Rembert v. Kelly*, Harper, 65.

But, if a person be arrested under a process which was erroneously issued, this is not a false imprisonment; because the irregular issuing of the process was owing to a mistake in an officer of the court, and not to the party at whose suit it was issued.

Stra. 509, *Philips v. Biron*. ¶Vide 1 Will. Saund. 90, n. 1; 15 East, R. 615, note c.¶ β Trespass does not lie against a plaintiff in a former action for suing out a writ of *cupias ad satisfaciendum*, and causing the defendant in that action to be taken in execution while he was attending court as a witness, under the protection of a *subpœna*, although the debt for which the execution issued had been previously paid. *Moore v. Chapman*, 3 H. & M. 260. But see, *contra*, *Bradley v. Carrington*, 1 Car. Law Repos. 369.

{If a defendant be liberated from confinement for want of being charged in execution, trespass will not lie against the plaintiff and his attorney for imprisoning him a second time, on a *ca. sa.* issued on the old judgment in the suit from whence he was discharged; the process being only voidable. And admitting that trespass would lie, the action could not be brought while the *ca. sa.* appeared regular on the record. Application must first be made to the court to set it aside for irregularity. Until that is done, the process will be a justification.

3 Cain. 267, *Reynolds v. Corp & Douglas*; Ibid. 274, *Reynolds v. Church & Douglas*.}

It seems to have been always holden, that it is not a false imprisonment in an officer to arrest a person under the process of superior courts, although the process were irregularly issued.

Bro. *Faux Impr.* pl. 31; 1 Ventr. 220; Stra. 509; {3 East, 140, *Grant v. Bagge*.}

{Only the known officers of the court, however, who are bound to execute its process, are protected, though the process be irregular, erroneous, or void. The same protection is not extended to bailiffs or other officers of inferior jurisdictions, to whom the process of a superior court has been

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erroneously directed, and which they have not been used to execute. It is not their duty to execute it, but they should apply to the court to quash it. 3 East, 128, *Grant v. Bagge*.}

It is laid down by Hale, C. J., that an arrest of a person under the process of an inferior court, by an officer of the court, is a false imprisonment in case the process were irregularly issued; it being incumbent upon the officer or minister of the court to take care that the process was regularly issued. But it is in divers books laid down, that the officer is not in this case liable to an action of trespass; for that it would be hard to punish a person who has done nothing more than execute the process of a court to which he owed obedience.

1 Ventr. 220, *Read v. Wilmot*; Cro. Ja. 3; 2 Leon. 89; 4 Leon. 78; 2 Mod. 196; Stra. 509. ¶ See 2 Lutw. R. 1560, 1572, and 1 Will. Saund. 90, n. 1, that an irregular or inverted order of proceeding is not void, so as to make an arrest under a *capias* false imprisonment. If the court had proper jurisdiction in the cause, neither the judges, nor ministers of the court, nor plaintiff, are liable to an action for a mere error; and see Willes, R. 30.¶

If a known bailiff arrest a person under a warrant of the sheriff, he is not obliged to show the warrant; for all persons are bound to take notice that he is a bailiff, and it is at his peril to arrest a man without a lawful warrant.

Bro. *Faux Impr.* pl. 23; 9 Rep. 69; ¶ *sed qu.* See 8 Term R. 188.¶

But if a special bailiff do not in such case show his warrant, a sight thereof being demanded at the time of arresting, the arrest is a false imprisonment.

Bro. *Faux Impr.* pl. 23; 9 Rep. 69.

If a known bailiff, who has two warrants against J S, one of which is legal, the other illegal, declare at the time of arresting J S that the arrest is by virtue of the illegal warrant, this is not a false imprisonment: for the lawfulness of the arrest does not depend upon what he declares, but upon the sufficiency of his authority to arrest J S.

12 Mod. 387, *Grenville v. The College of Physicians*; ¶ Salk. 144, 200, 263, 396; ¶ {7 Term, 654, *Crowther v. Ramsbottom*.}

It is in one case doubted whether an arrest by the assistant of a bailiff, whose name is not in the warrant, even in the presence of the bailiff, be not a false imprisonment.

6 Mod. 211. ¶ But this is settled otherwise: the officer having the authority need not be actually present, or even in sight; it is sufficient if he be *near* and acting in the arrest. Cowp. 65; Tidd, 217, (8th ed.)¶

But if a warrant be directed to two or more persons jointly and severally, an arrest by any one of these is not a false imprisonment.

1 Inst. 181. ¶ But a warrant to four *jointly* only, will not authorize an arrest by one. *Boyd v. Durand*, 2 Taunt. 161.¶ β When a magistrate exceeds his jurisdiction, he is liable in trespass. *Tracy v. Williams*, 4 Conn. 107; *Prince v. Thomas*, 11 Conn. 472; *Palmer v. Allen*, 5 Day, 193; *Williams v. Brace*, 5 Conn. 190; *The Thames Man. Co. v. Lathrop*, 7 Conn. 550; *Hall v. Howd*, 10 Conn. 514; *Dyer v. Smith*, 12 Conn. 384; *Heyden v. Shed*, 11 Mass. 500; *Smith v. Rice*, 11 Mass. 507; *Albee v. Ward*, 8 Mass. 79; *Inglee v. Bosworth*, 5 Pick. 498; *Stetson v. Kempton*, 13 Mass. 272; *Sere v. Armitage*, 9 Mart. Lo. R. 394; *Parker v. Walrod*, 13 Wend. 296; *Cable v. Cooper*, 15 Johns. 152; *Suydam v. Keys*, 13 Johns. 444; *Vail v. Lewis*, 4 Johns. 450; *Case v. Shepherd*, 2 Johns. Cas. 27; *Curry v. Pringle*, 11 Johns. 444; *Smith v. Shaw*, 12 Johns. 257. §

β A private person cannot apprehend another upon a suspicion of felony, for the purpose of taking him to the place where the theft was committed, in order to ascertain whether he was the thief.

Hall v. Booth, 3 Nev. & M. 316. §

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If a stranger assist a bailiff in confining a person, who has been arrested by the bailiff, this is not a false imprisonment.

Bro. *Tresp.* pl. 402; 2 Roll. Abr. 561, (F), pl. 2; Cro. Car. 446.

If a stranger, after a man has been arrested, confine him at the request of the bailiff who arrested him, this is not a false imprisonment.

2 Roll. Abr. 561, (F), pl. 2; Cro. Car. 446.

It was formerly holden, that if a person be arrested under the process of an inferior court, for a cause of action which did not arise within the jurisdiction of the court, it is a false imprisonment in the officer who made the arrest, and in the party at whose suit it was made. A distinction was afterwards taken between the party, at whose suit the arrest was in such case made, and the officer who made it. It was holden to be a false imprisonment in the former; because it shall be intended that he knew where the cause of action did arise; and it was a fault in him to sue in a court which had not jurisdiction in the matter. But it was holden not to be a false imprisonment in the officer, unless it appeared plainly that the cause of action did not arise within the jurisdiction of the court: for that, unless this did appear plainly, it was the duty of the officer to execute the process. This distinction seems to be at this day exploded; for it has been holden in another case, in which all the cases seem to have been well considered, that the party, at whose suit J S has been arrested under the process of an inferior court, is not liable to an action of trespass, although the cause of action did not arise within the jurisdiction of the court; for that J S can only take advantage thereof by pleading to the jurisdiction of the court.

10 Rep. 76, The case of the Marshalsea, Mich. 10 Jac.; 2 Mod. 197, Higgenson v. Martin, Hil. 28 Car. 2; 2 Jon. 214; Olliet v. Besey, Trin. 34 Car. 2; 2 Mod. 196, Higgenson v. Martin, Hil. 28 Car. 2; {Willes, 30, Moravia v. Sloper;} Ld. Raym. 230, Truscott v. Carpenter, Trin. 9 W. 3; {Willes, 122, Morse v. James; 3 Cran. 331, Wise v. Withers.} [This case of Truscott v. Carpenter, upon which the compiler of this part of the work so confidently relies, seems scarcely reconcilable with later resolutions. It should appear to be now settled, that where an inferior court assumes a jurisdiction, an action of trespass lies against the officer who executes the process, because the whole proceeding is *coram non judice*, and a mere nullity. Perkin v. Proctor, 2 Wils. 382, and the cases there cited; Hill v. Bateman, 2 Stra. 711; Shergold v. Holloway, Ibid. 1002.] ¶The case of Truscott v. Carpenter is now in effect overruled, and the doctrine of the Marshalsea case established; for it is settled that the *party* plaintiff in an execution in the inferior court is bound to show in his justification to an action of trespass for such execution, that the cause of action arose within the jurisdiction, but the *officer* of the court is not bound to do so. Moravia v. Sloper, Willes, R. 30; Rex v. Danser, 6 Term R. 245; Evans v. Munkley, 4 Taunt. R. 48; and see Ackerly v. Parkinson, 3 Maul. & S. 411. The officer, however, in his justification, must show that the court had jurisdiction of *such a matter*; for otherwise, according to the Marshalsea case, 10 Co. 76, Willes, 37, 38, he is clearly liable as well as the party: and this is what is meant in the note above of the last editor, who says that where the inferior court *assumes* a jurisdiction, an action lies against the officer; for the cases quoted in that note are cases where the court had not *jurisdiction over a similar subject-matter*. So that the law may be thus summed up: 1st. In cases where the court has jurisdiction of *such sort* of proceeding, and where the particular cause of action arose within the jurisdiction, but the court proceeds *inverso ordine*; there neither the judge, officer, nor party, are liable to an action of trespass. 2d. In cases where the court has jurisdiction of the sort of proceeding, but the particular cause did not arise within the jurisdiction; there the officer is excused, but the party who brought the cause before the court improperly is liable. 3d. In cases where the proceeding is entirely *coram non judice*, the court having no jurisdiction over the sort of proceeding; there the judge, officer, and party, are all liable; and, according to 4 Burr. 2108, the attorney, where he has acted beyond his duty or authority as an attorney. See 1 Saund. 75; 2 Saund. 101 y, note (2); 10 Co. Rep. 76 b, *notis*, (ed. 1826.)

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If a sheriff, to whom no writ was directed for arresting of A, make out a warrant to a bailiff to arrest A, and A be thereupon arrested, it is a false imprisonment in the sheriff, and in the bailiff; because there was no authority for the arrest.

1 Jon. 375, *Girling's case*.

But, if a writ were directed to a sheriff for the arresting of A, and he make out a warrant to a bailiff, under which A is arrested before the writ is delivered to the sheriff, this is no false imprisonment: for the writ is an authority for all that has been done, notwithstanding it was not delivered to the sheriff before the arrest.

3 Lev. 93, *Osborn v. Brookhouse*; 2 Lev. 19; *sed vide contra*, 1 Saund. 298; and *ibid.* notes (4), (5). And where the arrest appeared to have been made before the officer had any warrant, and before the writ was delivered to the sheriff, the court set aside the bail-bond. *Hall v. Roche*, 8 Term R. 187.||

¶ The defendant, a sheriff's officer, arrested the plaintiff in two suits, and took a regular bail-bond in one, and an instrument signed by the plaintiff, but not sealed nor filled up, in the other, although the fees were paid thereon, and it appeared that the defendant was informed of the debt in the first suit having been paid an hour before the plaintiff was liberated. Held, that there being no evidence of the plaintiff having been detained a moment longer than the defendant was justified in detaining him under a lawful writ, the action for false imprisonment was not maintainable.

Blessley v. Sloman, 3 Mees. & W. 40.

Every tribunal proceeding under special and limited powers, decides at its peril; when process is issued from a court not having jurisdiction, it is no protection to the court, to the attorney, to the party, nor even to a ministerial officer who innocently executes it.

Cable v. Cooper, 15 Johns. 152. But the ministerial officer is excused, unless it appear on the face of the process that the court has no jurisdiction. *Smith v. Shaw*, 12 Johns. 257; *Savacool v. Boughton*, 5 Wend. 170.

When the process is regular on its face, a ministerial officer is justified in executing it, although the officer issuing such process be but an officer *de facto*.

Wilcox v. Smith, 5 Wend. 231; *Savacool v. Boughton*, 5 Wend. 170.

When the court has jurisdiction of the subject-matter, and the process is regular, but issued on a satisfied judgment, it affords protection to the ministerial officer, but not to the plaintiff.

McGuinty v. Herrick, 5 Wend. 240.

A justice of the peace who issues a second execution after the first is satisfied, is a trespasser, although the plaintiff had falsely represented that the first was lost.

Lewis v. Palmer, 6 Wend. 367.¶

Although, however, the arrest upon such warrant be good, the granting thereof by a sheriff, or his deputy, is unlawful: for, by the 6 Geo. 1, c. 21, § 53, it is enacted, "That if any high sheriff, under-sheriff, or his or their deputy, shall make or cause to be made or delivered out to any person whomsoever, any warrant, before they or some one of them shall actually have in their custody the writ upon which such warrant ought to issue, that then the person or persons so offending, and every of them, shall forfeit ten pounds for every such offence."

If A be arrested instead of B, whom the sheriff had a writ to arrest, this,

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although B be very much like A in the face, is a false imprisonment; for the sheriff is at his peril to take care that he do not arrest any other person than him against whom the writ issued.

Bro. Office, pl. 8; 2 Roll. Abr. 552, (O), pl. 5; 1 Bulst. 149.

Nay, it has been holden, that if A tell an officer, who has a warrant to arrest B, that his name is B, and thereupon the officer arrest A, this is a false imprisonment; for that the officer is at his peril to take care that he do not arrest any other person than him against whom the writ issued.

Moor, 457, Coot v. Lightworth; Hardr. 323.

¶ And if the sheriff arrest a person under a writ issued against him by a wrong name, he cannot justify such arrest by averring that the person arrested and the person named in the writ are one and the same person.

Shadgett v. Clipson, 8 East, 328; and vide 6 Term R. 234; 1 Barn. & A. 647; 2 Camp. 270.¶

It is by the 29 Car. 2, c. 7, § 6, enacted, "That the person serving or executing any writ, process, warrant, order, judgment, or decree, upon the Lord's day, except in cases of treason, felony, or breach of the peace, shall be as liable to the suit of the party grieved, and to answer damages for the doing thereof, as if he had done the same without any writ, process, warrant, order, judgment, or decree."

¶ Vide 1 Term R. 265; 5 Term R. 25; 1 Anst. 85; 8 East, 547.¶

It is said, that the arresting of a clergyman under a civil process, either in going to church to perform divine service, or in returning from thence, on any day, is a false imprisonment.

Sheph. 1028. ¶ If any action at all lies in this case, it would rather seem, from some analogous cases, that the action must be on the case. 3 Wils. 341; 2 Black. R. 1087; Doug. 671.¶

If a person, against whom an escape warrant has issued, were arrested by the mob, and by them delivered to the sheriff, and the sheriff detain him, this is a false imprisonment; for, as he was not arrested by a proper officer, the arrest was illegal; and if so, the subsequent detention is illegal.

6 Mod. 154, Rich v. Doughty.

But, if a person, who was arrested by the bailiff of a liberty out of the liberty, were delivered by the bailiff into the custody of the jailer of the liberty, it is not a false imprisonment in the jailer to detain him, although an action of trespass would lie against the bailiff for the illegal arrest: for inasmuch as the jailer would have been liable to an action of escape, if he had refused to receive the arrested person, or if he had afterwards suffered him to go at large; it would be very unreasonable that he should be liable to an action of trespass for detaining him.

4 Skin. 50, Elliot v. Besey; 2 Jon. 214.

An unlawful detention of a person who has been arrested does, although the first arrest were lawful, amount to a new arrest, and consequently it is a false imprisonment.

Cro. Ja. 379, Withers v. Henley.

If a plaintiff, by an order in writing, direct a sheriff to discharge a person, whom he has arrested under a *capias* or an *exigent* at the suit of the plaintiff, and the sheriff afterwards detain the person, this is a false imprisonment.

3 Bulstr. 97, 98, Wythers v. Henley; Cro. Car. 379.

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If a sheriff detain a man, whom he has arrested under a *capias* or an *exigent*, after a writ of *supersedeas* has been delivered to him, this is a false imprisonment.

Fitz. N. B. 236; Cro. Ja. 379; 1 Roll. Rep. 141; 3 Bulstr. 97.

But the detaining of a man, who has been arrested under a *capias ad satisfaciendum*, after a writ of *supersedeas* has been delivered to the sheriff, is not a false imprisonment; because a writ of *supersedeas* does not lie after a person is taken in execution.

Fitz. N. B. 237; 1 Vent. 2; Jenk. 92, pl. 80.

It is not a false imprisonment, either in a sheriff or a jailer, to detain a man who ought otherwise to be discharged, until he pay the fees due to the sheriff or jailer.

2 Inst. 53.

If the order of a court be to confine a person in a certain prison, the confining of him in any other prison is a false imprisonment.

Salk. 408, Swinstead v. Lyddal; Skin. 664.

An officer, who has arrested a man under a *capias*, may confine him wherever he pleases; for the words of this writ are, *ita quod habeas corpus ejus coram, &c.*

Salk. 408, Swinstead v. Lyddal; Skin. 664.

It is in the general true, that an arrest for a criminal cause, without an express warrant, is a false imprisonment.

2 Inst. 51, 52.

And whenever an express warrant is necessary to authorize an arrest for a criminal cause, an arrest without an express warrant can never be justified under one granted after the arrest.

Bro. *Faux Impr.* pl. 8; 2 Hawk. P. C. c. 13, § 9.

But in some cases an arrest may be made for a criminal cause without an express warrant.

If a felony have been committed, and A have just cause to suspect it was committed by B, A may arrest B without an express warrant.

Bro. *Faux Impr.* pl. 1; 1 Bulstr. 150. ¶ See 1 Russ. on Cri. 502, (2 ed.) ¶ But a private person cannot lawfully make such arrest. Hall v. Booth, 3 Nev. & M. 316. §

But, if A arrest B without an express warrant, because C has just cause to suspect that B has committed a felony, A is guilty of a false imprisonment; (a) for the power of arresting without an express warrant is confined to the party suspecting.

Bro. *Faux Impr.* pl. 8; 1 Bulstr. 151; 2 Inst. 52; 2 Hawk. P. C. c. 13, § 11. (a) Not if A be a peace-officer; for a peace-officer may, upon a reasonable charge of felony, arrest a party without a warrant; nor will he be liable to an action, though it should afterwards appear that no felony has been committed. Samuel v. Payne, Doug. 359; ¶ Hobbs v. Branscomb, 3 Camp. 421. And so it is now settled that a constable may, on his own reasonable suspicion that a felony has been committed, arrest the party suspected, and will be justified though it afterwards appear that no felony have been committed. Beckwith v. Philby, 6 Barn. & C. 638; and see Doug. 360, note 7; Cald. 291; 1 Term R. 535, n. In 6 Barn. & C. 635, Lord Tenterden said, "There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities." And see 2 Selw. N. P. 910; but see Guppy v. Brittlebank, 5 Price R. 525. A private person justifying an arrest on suspicion of felony, must set forth in his plea the precise cir-

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circumstances of suspicion, in order that the court may judge of the sufficiency. *Mure v. Kaye*, 4 Taunt. 34. And a plea justifying the arrest of the plaintiff, on the ground that a horse of defendant had been taken out of his stable without his consent, (not stating "feloniously,") and that it was found in plaintiff's stable, and that defendant had grounds to believe, and believed, that it had been stolen by plaintiff, was held insufficient on demurrer. *Hedges v. Chapman*, 2 Bing. 523; and see *Rose v. Wilson*, 1 Bing. 353. If a person give an innocent party in charge to a constable, on suspicion of felony, trespass is the proper form of action against the party making the charge. *Stonehouse v. Elliot*, 6 Term R. 315; and see 2 Term R. 225. And so also if A positively state to the commander of a press-gang, that B is liable to impressment and he is not so, and in consequence of the statement B is impressed, A is liable to an action for false imprisonment at suit of B. *Qu.* If A had only stated he *believed* that B was liable to impressment? *Flewster v. Royle*, 1 Camp. 187.¶

A private person may, without an express warrant, arrest persons who are actually fighting; and keep them in custody until their passion is over.

1 Inst. 52; Bro. *Faux Impr.* pl. 6; 1 Hawk. P. C. c. 63, § 11; 2 Hawk. P. C. c. 13, § 8. As to what is an arrest, see *Mead v. Young*, 2 Dev. & Bat. 521; Bouv. L. D. *Arrest*; 2 N. H. Rep. 318; 1 Baldw. 239; Harper, 453; 8 Greenl. 127; 1 Wend. 215; 2 Blackf. 294.¶

And it is said, that the arresting of a person, who is coming to the assistance of one who is fighting, is not a false imprisonment.

1 Hawk. P. C. c. 63, § 11.

It is in the general true, that an arrest cannot be made, either by a peace officer or a private person, on the account of an affray, after the affray is over, without an express warrant.

2 Inst. 52; Bro. *Faux Impr.* pl. 6; 2 Hawk. P. C. c. 13.

But, if a man have received a dangerous wound in an affray, the party who gave the wound may be arrested after the affray is over, either by a peace officer or a private person, without an express warrant; and may be confined, until a judgment can be formed, whether it be probable that the wound will prove mortal.

2 Inst. 52; Bro. *Faux Impr.* pl. 6, pl. 44; 1 Hawk. P. C. c. 63, § 12.

A private person may, without an express warrant, arrest a person whom he sees upon the point of committing treason or felony, or of doing an act which may endanger the life of any person; and may confine him until it may be reasonably supposed that he has laid aside the design of committing the treason or felony, or doing the act.

2 H. H. P. C. 77.

¶A private person may justify breaking and entering the house of another, and assaulting and imprisoning him, in order to prevent him from committing murder on his wife.

Handcock v. Baker, 2 Bos. and P. 260; and see the learned reporter's note, p. 264.¶

A peace officer may, without an express warrant, arrest a person who has assaulted him.

Bro. *Faux Impr.* pl. 41.

A private person may, without an express warrant, confine a person disordered in his mind, who seems disposed to do mischief to himself, or to any other person.

Bro. *Faux Impr.* pl. 28, pl. 25.

It is laid down that a private person may, without an express warrant, arrest a night-walker; for that the doing of this is for the good of the public.

2 Inst. 52; Bro. *Tresp.* pl. 416.

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But it was holden in a modern case, that no person, not even a constable, can arrest a night-walker, unless the night-walker have been guilty of some disorderly act.

Ld. Raym. 1301, Tooley's case.

||In a late case it was decided, that a watchman was legally authorized to apprehend, and a ward beadle to commit to prison for examination, a person found by the watchman walking in the street at ten at night with a bundle in his hand, whom there was reasonable ground to suspect of felony, though there was no proof of felony having been committed.

Lawrence v. Hedger, 3 Taunt. R. 1, 3; and see 2 Burr. R. 164, and 54 G. 3, c. 57, § 18.||

A peace officer may, without an express warrant, arrest a person against whom a hue and cry has been levied.

Bro. *Faux Impr.* pl. 6, pl. 16; 1 Roll. Abr. 559, (D), pl. 1, pl. 2.

And it is laid down in some books, without confining the power of arresting to a peace officer, that the person against whom a hue and cry has been levied may be arrested without an express warrant.

2 Inst. 52; Bro. *Tresp.* pl. 213.

||Where the parish clerk refused to read in church a notice which was presented to him for that purpose, and the person presenting it thereupon read it himself, at a time when no part of the service was actually going on; it was held, in an action for false imprisonment, that although a constable might be justified in removing him from the church, and detaining him until the service was over, yet he could not legally detain him afterwards, in order to take him before a magistrate.

Williams v. Glenister, 2 Barn. & C. 699.

If, at a county court held for the election of knights of the shire, a freeholder interrupt the proceedings by making a great noise and disturbance, the sheriff is justified in ordering him to be taken into custody, and carried before a justice of the peace.

Spilsbury v. Micklethwaite, 1 Taunt. 146.

Commissioners of bankrupt are not subject to an action of trespass for committing a person who does not answer to *their* satisfaction, when examined before them, touching the estate and effects of a bankrupt.

Doswell v. Impey, 1 Barn. & C. 163, overruling Miller v. Seare, 2 Black. R. 1141.||

It is in the general true, that an express warrant for the arresting of a person ought to be in writing.

But an arrest under a parol warrant of the Court of King's Bench is not a false imprisonment.

2 Roll. Abr. 558, (C), pl. 2.

It is laid down in one case, that the confining of a man for a short space of time, under the parol warrant of a justice of the peace, for further examination, is not a false imprisonment.

Moor, 408, Broughton v. Mulshoe.

But it is in another case laid down, that a confinement for further examination, under parol warrant of a justice of the peace, ought not to exceed three days.

Cro. Eliz. 829, Savage v. Tatcham.

It is lawful for a justice of the peace to authorize any person, by parol

A commitment under the warrant of a justice of the peace, which does not mention the crime for which the person is committed, is a false imprisonment.

Cro. Ja. 81, Boucher's case. If after a warrant has been issued by a magistrate, it is altered by another and the name of another person is inserted, who is afterwards arrested, it will be no justification to the officer. Hoskins v. Young, 2 Dev. & Bat. 527.g

But a justice of the peace may grant a warrant to arrest a man for further examination, without mentioning the crime of which he is accused; for it may not always be proper to let even the peace officer know the crime of which the party to be arrested is accused.

Cro. Ja. 81; 2 Hawk. P. C. c. 13, § 11. [Qu. of such a warrant.]

If a person be arrested under the warrant of a justice of the peace, for a matter of which the justice had not jurisdiction, it is a false imprisonment in the justice.

2 Hawk. P. C. c. 13, § 10. But the officer acting by authority of the warrant is justified. Taylor v. Alexander, 6 Ohio, 146.g

||If the keeper of a prison receive and detain a person under a warrant, and it turns out that the warrant was executed against a wrong person, the keeper is liable to an action for false imprisonment, although he acted *bona fide*, and had no means of ascertaining the identity of the person.

Aaron v. Alexander, 3 Camp. 35.||

If a sworn peace officer arrest a person under the warrant of a justice of the peace in the precinct of which he is an officer, it is not necessary to show the warrant.

2 Hawk. P. C. c. 13, § 28; *sed vide* 8 Term R. 186.||

But, if a person be arrested under such warrant by a person who is not a sworn peace officer, or by a sworn peace officer out of his precinct, and the warrant be not, upon a demand thereof at the time of arresting, shown, it is a false imprisonment.

2 Hawk. P. C. c. 13, § 28.

[It is enacted by 27 Geo. 2, c. 20, that in all cases where any justice of the peace is required or empowered by any statute to issue a warrant of distress for the levying of any penalty by any act of parliament now in force, or hereafter to be made, or sum of money thereby directed to be paid, "the officer executing such warrant, if required, shall show the same to the person whose goods and chattels are distrained, and shall suffer a copy thereof to be taken."]

||If a constable show to a party a magistrate's warrant against him, and the party then voluntarily accompany the constable to a magistrate without any personal arrest, and the magistrate on examination dismiss the party, this is not such an arrest as will enable him to support trespass and false imprisonment against the constable.

Arrowsmith v. Le Mesurier, 2 New R. 211; and see 3 Camp. 139.

So also, where a sheriff's officer, to whom a warrant on a writ against A was delivered, sent a message to A, and asked him to fix a time to call and give bail; and A accordingly fixed a time, attended, and gave bail; it was held, that this was not an arrest on which an action for malicious

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arrest could be supported, although the plaintiff in the action had no cause of action against A.

Berry v. Adamson, 6 Barn. & C. 528; and see *Russen v. Lucas*, Ry. & Moo. Ca. 26; *George v. Radford*, Moo. & Mal. Ca. 246; *sed vide Pocock v. Moore*, Ry. & Moo. Ca. 321.||

If a peace officer, after having arrested a man under a warrant of a justice of the peace, suffer him to go at large, and afterwards retake him under the same warrant, it is false imprisonment.

2 Hawk. P. C. c. 13, § 9.

The point is not quite settled: but it seems to be the better opinion, that, although a peace officer cannot retake a person, whom he had before arrested under a warrant of a justice of the peace and suffered to go at large, under the same warrant, if the person voluntarily surrender himself, it is lawful for the peace officer to detain him, and carry him before a justice of peace.

2 Hawk. P. C. c. 13, § 9.

Heretofore, if a peace officer had arrested a person under the warrant of a justice of peace, for an offence of which it appeared, upon the face of the warrant, that the justice had not jurisdiction, it would have been a false imprisonment.

2 Hawk. P. C. c. 13, § 9.

But by the 24 Geo. 2, c. 44, § 6, it is enacted, "That no action shall be brought against any constable or other officer, or against any person acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace, until demand hath been made or left at his usual place of abode in writing, signed by the party intending to bring such action, of the perusal and copy of such warrant, and the same had been refused or neglected for the space of six days after such demand."

||In order to bring constables, &c., within the protection of this statute, the act must be done in *obedience* to the warrant. 3 Burr. 1742; 5 East, 233; and see tit. *Constable*.||

||An action for false imprisonment lies by an inferior against his superior military officer, for an imprisonment under military arrest, if such imprisonment be excessive beyond what military discipline, under the circumstances of the case, requires.

Wall v. M'Namara, 1 Term R. 536; *Swinton v. Molloy*, Ibid. 537; and see *Bradley v. Arthur*, 4 Barn. & C. 292.||

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1. *To live Property.*

It has been holden, that no person can have such property in a negro in England, as will enable him to recover the value of the negro in an action of trespass, in case he be taken away: and that the master of the negro can only recover, as he may in the case of another servant, damages for the loss of service.

Ld. Raym. 146, *Chamberlain v. Harvey*, Hil. 8 W. 3.

It appears from another report of this case, that one question was, Whether the baptism of the negro, after taking him from his master, did not amount to an emancipation? But the court determined the case upon the general question, without giving an opinion as to this question.

Carth. 397.

trover for the conversion of the negro; and in this case the authority of the case of *Butts v. Penny*, 2 Lev. 20, in which it had been holden that an action of trover will lie in such case, was denied.

Ld. Raym. 1274, *Smith v. Gould*, Pasch. 5 Ann. [Vide Mr. Hargrave's argument in the case of *Sommeret*, a negro.]

¶The doctrine of these cases has been extended in a recent case, in which it was held, that getting on board of a British ship of war on the high seas had the same effect in emancipating a negro as landing on British soil; and that a British subject, resident in a country where slavery was allowed by law, and owning negroes there who made their escape, could not maintain an action against the commander of a British ship on board which they took refuge, for harbouring the slaves after notice.

Forbes v. Cochrane, 2 Barn. & C. 448.

But a native of a country where slavery is allowed by law, may recover, in a British court, the value of slaves wrongfully seized by a British officer, on board a ship of the country allowing slavery. —

Madrazo v. Willes, 3 Barn. & A. 353.]

If the sheep of J N be mixed with the sheep of J S, and J S chase them to the next convenient place for that purpose, in order to separate his sheep from the sheep of J N, an action of trespass does not lie; for as they could not have been easily separated without it, the chasing was lawful.

Bro. *Tresp.* pl. 213.

If J S chase the beast of J N with a little dog out of land in the possession of J S, an action of trespass does not lie; inasmuch as J S has an election to do this, or to distrain the beast.

4 Rep. 38, *Tirringham's case*; 2 Roll. Abr. 566, (J), pl. 15; 1 Jon. 131.

But, if J S chase the beast of J N with a mastiff dog out of land in the possession of J S, and any hurt be thereby done to the beast, this action does lie; the chasing with such a dog being unlawful.

1 Freem. 347, *King v. Rose*; 4 Rep. 38; Cro. Car. 254.

If a stranger chase the beast of J N out of land in the possession of J S, action of trespass lies.

Bro. *Tresp.* pl. 421; Kelw. 46.

¶Though a party take a beast lawfully at first as an estray, trespass lies against him if he afterwards labour it and abuse it.

Oxley v. Watts, 1 Term R. 12.]

If the dog of J S kill a sheep, the property of J N, an action of trespass does not lie, unless J S knew the dog had been accustomed to bite sheep.

Dyer, 25, pl. 162.

If the owner of a very fierce dog suffer him to go about the streets unmuzzled, and the dog bite a man, an action of trespass does not lie, unless the owner knew the dog to be very fierce.

12 Mod. 332, *Mason v. Keling*; Ld. Raym. 608, S. C. ¶The declaration in *Mason v. Keling* was *in case*, not trespass; and trespass does not lie for *keeping* a dog accustomed to bite, with a *scienter*—case is the remedy. Ld. Raym. 608; 1 Barn. & A. 620; 1 Stark. N. P. C. 285. If, indeed, a person let loose a dangerous animal, and mischief happen, he is said to be answerable in trespass. 3 East, R. 596.]

An action of trespass lies for taking or killing a dog; because, as a

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dog is a tame animal, there may as well be a property therein as in any other animal.

Fitz. N. B. 86; Bro. *Tresp.* pl. 407; Hob. 283; Cro. Eliz. 125; Cro. Ja. 463; [3 Term R. 37. See also stat. 10 G. 3, c. 18; 36 G. 3, c. 124.]

But, if while J S is chasing the beast of J N with a mastiff dog, in order to drive it out of land in the possession of J S, J N, to prevent mischief to his beast, kill the dog, this action does not lie.

1 Freem. 347, King v. Rose. {So he may kill him to prevent danger to himself. Addis, 215, Bowers v. Fitzrandolph.} ¶But it would seem that in such case the killing the dog cannot be justified, unless it be necessary for the purpose of preventing his killing the beast. 1 Saund. 84; 1 Camp. N. P. C. 41.¶

This action does not lie for killing a dog found in a warren; because, such a dog is to be considered as a species of vermin.

Cro. Ja. 45; Sid. 336.

And it has been holden, that this action does not lie for killing a dog found in a park, although the dog might have been taken alive.

3 Lev. 28, Barrington v. Turner.

¶The two last cases apply only to dogs, in warrens and parks, strictly so called; for it is settled that a gamekeeper cannot justify killing a dog pursuing a hare in the manor and close of his lord. The plea in this case did not distinctly state that the killing of the dog was necessary in order to preserve the hare; but it is doubtful whether that allegation would have made any difference.

Vere v. Lord Cawdor, 11 East, R. 568, as to the right of setting engines for destroying dogs in pursuit of game. Vide 7 Taunt. 489; 1 B. Moo. 203.¶

An action of trespass does not in the general lie for the taking or killing of a beast or a bird, which is *feræ naturæ*, because there is no property in either of these.

But, if a beast or bird which is *feræ naturæ* have been reclaimed, this action lies for the taking or killing thereof; because there is a property in the beast or bird.

Bro. *Detin.* pl. 44; Bro. *Tresp.* pl. 407.

And an action of trespass does in some cases lie for taking or killing a beast or bird; although the beast or bird be *feræ naturæ*, and have not been reclaimed.

If a hare or coney be taken or killed upon the land of J S, this action lies, although the land be not a warren, or the hare or coney have not been reclaimed; for J S has, by reason of its being upon his land, a local property in the hare or coney. (a)

Fitz. N. B. 87; Godb. 123; Salk. 556; 11 Mod. 75. ¶(a) A party cannot have a property in rooks in a rookery, so as to entitle him to sue for disturbing them; for they are destructive animals. Hannam v. Mockett, 2 Barn. & C. 934.¶

But, if a hare or coney be driven off the land of J S, and killed by J N, J S cannot in the general maintain this action; because the property, which was only a local one, is determined by driving the hare or coney off the land.

5 Rep. 104, Boulston's case; Cro. Car. 554. ¶Vide 2 Salk. 556; 14 East, 249.¶

If, however, J S immediately pursue the hare or coney, which has been driven off his land and killed by J N, it is not lawful for J N to carry it away; for by the immediate pursuit of J S, the local property is continued.

Godb. 123; Salk. 556; 11 Mod. 75.

Duke of Devonshire v. Lodge, 7 Barn. & C. 36.]

If the beast of J S have been unlawfully taken by J N, an action of trespass does not lie for the retaking thereof by J S, because J N was himself the first wrongdoer.

Bro. *Tresp.* pl. 323; Cro. Eliz. 329. [See *Rex v. Milton*, 1 Moo. & Malk. Ca. 107.]

And for the same reason, if the mare of J S, which was unlawfully taken by J N, afterwards drop a foal, an action of trespass does not lie against J S for the retaking of the mare, and the taking of the foal.

Bro. *Tresp.* pl. 323.

If the beast of J S have been seized for the use of the king, and J S even before office found retake it, an action of trespass lies; for by the seizure his property was divested.

Bro. *Tresp.* pl. 357. [Vide *Wilkins v. Despard*, 5 Term R. 112.]

An action of trespass lies for the taking of a beast, although it be afterwards retaken by, or restored to, the owner: for the retaking or restoring in such case only goes in mitigation of damages.

Bro. *Tresp.* pl. 221; 8 Roll. Abr. 569, pl. 3, pl. 6.

3. To dead Property.

If a ship have been wrecked, and the goods of J S which were in the ship be taken up by J N, J S cannot maintain an action of trespass; because J N did not obtain the possession of the goods tortiously, but by the act of God.

Bro. *Tresp.* pl. 54; 2 Roll. Abr. 555, pl. 6. [Plundering wrecks is a capital felony. 7 & 8 G. 4, c. 29, § 18.]

If the goods of J S, which have been illegally taken in execution by a sheriff, are by the sheriff delivered to J N, this action does not lie; because the possession of the goods was lawfully obtained by J N.

Bro. *Tresp.* pl. 48.

If J S, in whom the general property in goods is, give or sell them to J N, but do not deliver them, and J N take them, an action of trespass does not lie; because, as J N did by the gift or sale acquire a property in the goods, he had a right to the possession of them.

Bro. *Tresp.* pl. 124, pl. 303; Latch, 213.

But, if an infant, in whom the general property in goods is, give or sell them to J N, but do not deliver them, and J N take them, this action does lie; because, as the general property of the infant was not divested by the gift or sale, the possession of the goods was tortiously obtained by J N.

Bro. *Tresp.* pl. 150.

If, however, an infant, in whom the general property in goods is, give or sell them, and also deliver them to J N, this action does not lie; because, although the general property of the infant was not divested by the gift, or sale and delivery, the possession of the goods by J N was obtained lawfully.

Bro. *Tresp.* pl. 150.

If the bailee of goods give or sell them to J N, but do not deliver them,

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and J N take them, an action of trespass lies; because, as the gift or sale of a person who had only a special property in the goods did not transfer a property to J N, his possession of the goods was tortiously obtained.

Bro. *Tresp.* pl. 216.

If a servant, who is empowered to sell the goods of his master, give them to J N, and deliver them, and J N carry them away, an action of trespass does not lie; because, as a power to sell goods implies a power to transfer a property in them, the possession of the goods by J N was lawfully obtained.

Bro. *Tresp.* pl. 295.

But, if a servant, who has only the custody of his master's goods, give or sell them to J N, and deliver them, and J N carry them away, this action lies; because, as the servant had no power to transfer a property in the goods, the possession of the goods by J N was tortiously obtained.

Bro. *Tresp.* pl. 295.

It seems to be the better opinion, that if the goods of J S be given or sold, and delivered by his wife to J N, and J N carry them away, an action of trespass does not lie; because, as a wife has a power over the goods of her husband, the possession of J N was lawfully obtained.

Bro. *Bar. and Feme*, pl. 36; Bro. *Tresp.* pl. 92.

If goods have been seized illegally by an officer of the customs, an action of trespass lies; notwithstanding there was a probable cause of seizure; for the officer acted at his peril.

Stra. 820, *Leglise v. Champante*; {1 Cain. 566, *Imlay v. Sands*. See also 2 W. Black. 912, *Bostock v. Saunders*; 3 Wils. 434, S. C.} [But in the Court of Exchequer, Lord C. B. Bury, Montague, and Page, against Price, held, that where an officer has made a seizure, and there is an information upon it, &c., which goes in favour of the party, who afterwards brings trespass, the showing these proceedings is sufficient to excuse the officer: it is competent to make out a probable cause for his doing the act. Vin. Abr. tit. *Evidence*, (P) b, 6.—In actions of trespass against custom-house officers for taking goods, the *onus probandi* of non-payment of the duties lies upon the defendants. *Salomon v. Gordon*, 2 Bl. R. 813; *Henshaw v. Pleasance*, 2 Bl. R. 1174. ¶ See vide 19 G. 2, c. 34, § 16, for the protection of custom-house officers from actions for seizures.¶]

{An officer, acting under a commission from government, who is enjoined by law to the performance of certain things, *if in his judgment or opinion* the same shall be necessary or proper, or the requisites therein mentioned have been complied with, and inhibited, under the like exercise of his own discretion, from doing other things; who is sworn to discharge these duties to the best of his ability; and exposed also to penalties, as well for negligence, as for acting where he ought not, is not answerable to a party, who may conceive himself aggrieved, for an act or omission arising from mistake or mere want of skill, if there be no bad faith, corruption, malice, or some misbehaviour, or abuse of power.

2 Cain. 312, *Seaman v. Patten*.

Trespass will not lie against an officer of the navy for detaining a neutral vessel, in pursuance of instructions {¹} from the executive, for the purpose of examination, or for diverting her, on reasonable {²} suspicion, from the course of her voyage, and sending her into port, although in consequence of her being taken out of her course, she is captured by another nation and

3 Cain. 120, Ruan v. Perry. {¹} Provided those instructions are warranted by law.
2 Cran. 170, Little v. Barreme. {²} See 1 Cran. 1, Talbot v. Seeman; 2 Cran. 64,
Murray v. Schooner Charming Betsey; 2 Cran. 170, Little v. Barreme; 3 Cran. 458,
Maley v. Shattuck; 4 Cran. 28, Jennings v. Carson.

But if he seizes a vessel on the high seas, and takes her out of the course of her voyage, *without probable cause*, he is liable to damages, even though the vessel is taken out of his possession by a superior force; and the owner is not bound to resort to the recaptor, but may abandon, and hold the original captor liable for the whole loss.

2 Cran. 64, Murray v. Schooner Charming Betsey; 3 Cran. 458, Maley v. Shattuck.}

¶Excise officers are protected from vexatious actions by the 23 Geo. 3, c. 70, which provides, that in case of any suit or information brought on any seizure under the excise laws, and the judge shall certify that there was probable cause for the seizure, the claimer shall not be entitled to costs.

The 30th section requires a month's notice of action to be given to any excise officer before suing out the writ, and empowers him to tender amends.

Searchers of leather, appointed under the 2 Jac. 1, c. 22, are not protected by any statute; and therefore, as their authority is to seize leather insufficiently dried, and carry it before triers, if they seize leather which is sufficiently dried, though to the best of their judgment it seemed not so, they are liable to an action of trespass.

Warner v. Varley, 6 Term R. 443.¶

If the goods of J N are taken by a sheriff, who has a writ to levy the goods of J S, an action of trespass lies; for the sheriff is at his peril to take care that he do not levy the goods of any other person than J S.

Bro. Tresp. pl. 364; 2 Roll. Abr. 552, (O), pl. 3, pl. 9; Carth. 381; [Ackworth v. Kempe, Dougl. 40, S. P.]

¶But if the goods of A are taken under a precept issued by the steward of a court baron, commanding his bailiff to take the goods of B, the steward is not liable to an action of trespass at suit of A; for the steward is a *judicial* officer, and not a *ministerial* one, like a sheriff.

Holroyd v. Breare, 2 Barn. & A. 473; and see 2 Carr. & P. Ca. 582.¶

If J S take the goods of J N, to prevent them from being stolen or spoiled, an action of trespass lies; because the loss to J N would not, if either of these things had happened, have been irremediable.

Bro. Tresp. pl. 213.

But, if the goods of J N are in danger of being destroyed by fire, and J S, in order to prevent this, take them, the action does not lie; because the loss, if this had happened, would have been irremediable.

Bro. Tresp. pl. 213.

It is said in one book, that an action of trespass does not lie for the taking of goods, after the person who took them has been indicted for felony and acquitted; for that, as *omne majus trahit ad se minus*, the trespass is extinguished in the felony.

Bro. Tresp. pl. 415.

But it is in other books laid down, that if J S, who has been indicted

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for feloniously taking the goods of J N, have been acquitted, J N may maintain this action ; because, as it does not in this case appear from the record that the taking was felonious, it seems highly reasonable that J N should recover the value of his goods.

1 Jon. 150, *Markham v. Cobb* ; *Latch*, 144 ; *Noy*, 82 ; *Sty.* 346 ; {*Taylor*, 58, *Smith v. Weaver*.}

An action of trespass does not lie for the taking of goods, for which an appeal of robbery has been brought ; for a person, who has by bringing the appeal affirmed the taking to be felonious, shall not afterwards be received to say that it was only a trespass.

1 Jon. 148, 150, *Markham v. Cobb* ; *Latch*, 144, S. C.

It has been in one case holden, that if J S have been convicted or attainted of feloniously taking the goods of J N, J N cannot, provided he did himself give evidence, or did procure any person to give evidence against J S, maintain an action of trespass ; because he is in either case entitled, under the 21 H. 8, c. 11, to a restitution of the goods.

1 Jon. 147, 150, *Markham v. Cobb*, *Pasch.* 1 Car. ; *Latch*. 144, S. C. ; *Noy*. 82, S. C.

It is laid down in a subsequent case, that an action of trespass does lie in such case ; for that, as the party robbed has done his duty to the public in prosecuting the thief, it is reasonable he should have a remedy for the injury to himself.

2 Roll. Abr. 557, (Y), pl. 24, *Dawkes v. Cavenagh*, Mich. 1652.

It appears from the report of the former case, that the three justices were divided in opinion, whether an action of trespass does lie, where J S, who took the goods of J N, has been convicted or attainted of taking them feloniously ; although no evidence were given against J S by J N, or by any person procured by him. *Doddridge*, J., and *Whitelock*, J., were of opinion, that, where the party robbed has been a party to the prosecution, he is a party to the record of conviction or attainder by which the taking of the goods appears to have been felonious ; and consequently he shall not be afterwards received to say, that the offence was only a trespass : but that, where the party robbed has not been a party to the prosecution, he may maintain an action of trespass ; and the rather, because he would otherwise be without remedy ; for the 21 H. 8, c. 11, only gives restitution of the goods, “ where *the felon is convicted, or otherwise attainted, by reason of the evidence given by the party robbed, or by any other by his procurement.* ”—But *Jones*, J., was of opinion, that this action does not lie in either case. He admitted, that, if the party robbed bring an action of trespass before the conviction or attainder of the person who took them, the latter cannot plead that he took the goods *animo furandi* ; for that he shall not be suffered to defeat the action by such an explanation of his intention ; but that, if it appear from a record that the taking of the goods was felonious, this may be pleaded in bar of the action of trespass.

1 Jon. 147, *Markham v. Cobb* ; *Latch*, 144, S. C. ; *Noy*, 82, S. C.

|| Lord Hale, referring to the above cases, lays it down, that after the party's conviction an action lies for the party injured ; “ because now the party hath prosecuted the law against him, and no mischief to the commonwealth.”

1 Hale, P. C. 546.

injury, if the plaintiff be not shown to have consented in procuring the acquittal.

Crosby v. Lenz, 12 East, R. 409.]

If J S extort money from J N, an action of trespass lies; every act of extortion being a trespass.

11 Mod. 137, Woodward's case. [This is a *dictum* of Lord Holt, whose words are "an action of trespass will lie for *frightening* another out of his money." If by frightening is meant using violence amounting to an assault, then no doubt trespass will lie; but extortion by any other means, it is conceived, is not the subject of an action of trespass.]

If the obligor take away a bond from the obligee, an action of trespass lies.

3 Roll. Abr. 557, (D), pl. 1.

An action of trespass lies against a rector or vicar for taking a coat of arms or a grave-stone out of his church; for neither of these is to be considered as an oblation.

Bro. Tresp. pl. 181.

[And it has in a late case been held by the Court of Common Pleas, that although the freehold of the churchyard is in the parson, yet trespass lies by the erector of a tombstone against a person who wrongfully removes it from the churchyard, and erases the inscription.

Spooner v. Brewster, 3 Bing. 186; and see the cases there cited.]

If J S, who has a deed belonging to J N in his power, tear off the seal, an action of trespass lies.

Bro. Tresp. pl. 29.

If a miller take toll of corn, whereof none ought to be taken, an action of trespass lies.

Bro. Tresp. pl. 47.

If J S draw wine out of the vessel of J N, and afterwards fill up the vessel with water, an action of trespass lies; for by so doing the residue of the wine is damaged.

Fitz. N. B. 88.

The owner of a several fishery may distrain nets found in his water, as being damage-feasant; but, if he cut them, an action of trespass lies.

Cro. Car. 238, Raynal v. Champenoon. [But he may place hooks in the bed of the stream to destroy them, per Gibbs, C. J., 7 Taunt. 529.]

[So a land-owner may distrain tithes as damage-feasant, if the tithe-owner do not fetch them away in a reasonable time after they are set out and notice given; but if the land-owner turn his cattle to consume such tithes, he is liable to an action of trespass.

Williams v. Ladner, 8 Term R. 72.]

If the master of a ship, in order to prevent her from sinking, throw goods overboard, an action of trespass does not lie; the doing of this being necessary for preserving the lives of the persons on board.

2 Roll. Abr. 567, (K), pl. 2. [Vide tit. *Merchant*, head *Average*, Vol. vi.]

If the goods of J S, which have been taken unlawfully by J N, are taken by J S, an action of trespass does not lie; because J N was himself the first wrongdoer.

Bro. Tresp. pl. 323; Cro. Eliz. 329. [See Channon v. Patch, 5 Barn. & C. 897.]

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If leather which was unlawfully taken from J S be made into shoes, an action of trespass does not lie against J S for taking the shoes.

Bro. *Tresp.* pl. 23.

If a piece of timber which was illegally taken from J S have been hewed, this action does not lie against J S for retaking it.

Bro. *Tresp.* pl. 23; {5 Johns. Rep. 348, *Betts & Church v. Lee.*}

But if a piece of timber, which was illegally taken, have been used in building or repairing, this, although it is known to be the piece which was taken, cannot be retaken; the nature of the timber being changed; for by annexing it to the freehold it is become real property.

Bro. *Tresp.* pl. 23.

If the money of J S, which is not to be distinguished from the money of J N, have been illegally taken by J N, it is not lawful for J S to take any money from J N, because he cannot be certain that he takes his own money.

Bro. *Tresp.* pl. 23.

If J S mix an unknown quantity of his corn or money with an unknown quantity of the corn or money of J N, and J N take the whole, an action of trespass does not lie; because it cannot be known how much thereof is the property of J S; and as the intermixing must have proceeded from a design of getting some of the corn or money of J N, or from the folly of J S, it is very reasonable that J S should, in either case, be punished with the loss of his own corn or money.

Cro. Ja. 366, *Ward v. Ayre*; 2 Bulst. 323; {5 East, 7.}

An action of trespass did heretofore lie for distraining goods for money due for the relief of the poor, in case there were a defect in the authority under which the distress was taken.

But it is by 17 Geo. 2, c. 38, § 8, enacted, "That where any distress shall be made by an overseer for money justly due for the relief of the poor, the distress shall not be deemed unlawful, nor the party making it a trespasser, on account of any defect, or want of form, in the warrant of appointment of such overseer, or in the rate of assessment, or in the warrant of distress thereupon."

[It is not competent to a person to try an objection to a rate in an action of trespass against the officers who may distrain for the non-payment of the rate; the proper mode of proceeding in such case is by appeal.

Durrant v. Boys, 6 Term R. 580.]

An action of trespass lies for the taking of goods, although they are afterwards retaken by, or restored to, the owner; for the retaking or restoring only goes in mitigation of damages.

Bro. *Tresp.* pl. 221; 2 Roll. Abr. 569, pl. 3, pl. 6.

(F) For what Injuries to Real Property an Action of Trespass lies.

1. To Land.

If a man, who is assaulted and in danger of his life, run through the close of another without keeping in a footpath, an action of trespass does not lie; because the doing of this, it being necessary for the preservation of his life, is lawful.

37 H. 6, 37, pl. 26.

to J N if the beast had died would have been irremediable, the doing of this is lawful.

Bro. Tresp. pl. 213.

But if J S go into the close of J N to prevent the beast of J N from being stolen, or to prevent his corn from being consumed by hogs or spoiled, this action does lie; for the loss, if either of these things had happened, would not have been irremediable.

Bro. Tresp. pl. 213.

If a tree, the property of J S, be blown down, and it fall upon the land of J N, and J S go upon the land to take it away, an action of trespass does not lie.

Bro. Tresp. pl. 213.

But if the loppings of a tree belonging to J S, fall upon the land of J N, and J S go upon the land to take them away, this action does lie, provided the falling of them there might, by using proper caution, have been prevented.

Bro. Tresp. pl. 213.

If the fruit of a tree belonging to J S fall upon the land of J N, and J S go upon the land to take it away, an action of trespass does not lie; because the falling of this there could not be prevented.

Latch, 120, *Millen v. Fawdry*.

If J S walk without keeping in a footpath in the close of J N to look for a beast which he has lost, an action of trespass lies.

2 *Roll. Abr.* 565, *Toplady v. Sealy*.

But if the beast of J S, which has been stolen, be put into the close of J N, and J S go therein to take it away, this action does not lie.

2 *Roll. Rep.* 55.

If J S have driven the beast of J N into the close of J S, or, if it had been driven thereinto by a stranger with the consent of J S, and J N go thereinto to take it away, this action does not lie; because J S was himself the first wrongdoer.

2 *Roll. Abr.* 566, 1, pl. 9; *Cro. Eliz.* 329.

If J S chase the beast of J N, which is damage-feasant in the close of J S, into the ground of J N, an action of trespass does not lie; because J S had a right to do this.

Latch, 120, *Millen v. Fawdry*.

But if a stranger chase the beast of J N, which is damage-feasant therein, out of the close of J S, this action does lie; for by doing this, although it seem to be for his benefit, J S is deprived of his right to distrain the beast.

Bro. Tresp. pl. 421; *Kelw.* 46, B.

If a sheriff, who comes to replevy the beast of J S, which is impounded in the close of J N, break down the fence of the close and enter that way, when he might have gone through the gate, an action of trespass lies.

2 *Roll. Abr.* 552, (O), pl. 7.

But if, by reason of the threat of J N, the sheriff fear his life will be in

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danger if he go through the gate, and in consequence of this he break down the fence of the close, and enter that way, this action does not lie.

2 Roll. Abr. 552, (O), pl. 8.

If a beast have been distrained damage-feasant, an action of trespass does not lie for the damage done; for the possessor of the land, after having made his election to distrain, ought not to have another remedy for the same injury.

12 Mod. 663, *Vasper v. Edwards*; Salk. 248.

As the beast, however, is in such case a mere pledge, and not a satisfaction for the damage done, if it die, or escape so as to be lost, without the default of the distrainer, this action does lie; because, as the detaining of the beast was owing to the default of the owner, in not making a satisfaction for the damage done, he ought to take the consequence of its dying or escaping.

12 Mod. 663, 664, *Vasper v. Edwards*; Ld. Raym. 720; Salk. 248.

But if the death or escape of the beast were owing to the default of the distrainer, he cannot maintain this action; for it would be very hard that the owner should, after losing his beast by the default of the distrainer, be liable to make satisfaction for the damage done.

12 Mod. 663, 664, 665, *Vasper v. Edwards*; Ld. Raym. 720; Salk. 248.

An action of trespass lies for erecting a stall in a public market; for, notwithstanding every man has of common right the liberty of selling in such market, no man can erect a stall on the soil of another without his permission.

Stra. 1239, *The Mayor of Northampton v. Ward*; [1 Wils. 107, S. C.] [Vide Willes, R. 623; *Smith v. Pearce*, *Woodfall's Land and Ten.* 542.]

[So it lies for placing tables, stools, in a market-place for sale without the leave of the owner of the soil.

Mayor, &c. of Norwich v. Swann, 2 Bl. Rep. 1116.]

If a person who is bound to erect a building upon the land of J S, bring a carpenter, not being one himself, upon the land of J S to erect the building, an action of trespass does not lie; because the doing thereof is of necessity.

Bro. *Tresp.* pl. 342.

If J S, who is bound to repair a bridge, cannot do this without coming upon the land of J N, an action of trespass does not lie for his coming thereupon; because the doing of this is necessary.

Bro. *Tresp.* pl. 260.

But if J S have commanded A to deliver a beast to J N, and J N go into the close of J S to receive the beast, this action does lie; for, as the beast might have been delivered at the gate of the close, the going of J N thereinto is not necessary.

Bro. *Tresp.* pl. 342.

If J S have sold trees growing upon his land to J N, and J N go upon the land to cut and take them away, an action of trespass does not lie; the right of doing this being incident to the purchase.

2 Roll. Abr. 567, (M), pl. 1. See *Carrington v. Roots*, 2 Mees. & W. 248.

And, for the same reason, if the land, on which trees growing are sold,

If a man, who is seised in fee of land, after having felled trees thereupon, die, and his executor go upon the land within a reasonable time after his death to take them away, an action of trespass does not lie; because the law gives an executor a reasonable time to possess himself of the goods of his testator.

2 Roll. Abr. 564, (H), pl. 1, pl. 2; 1 Brownl. 224.

If J S, who has a right to a pipe which serves as a water-course through the land of J N, come upon the land of J N, and dig, in order to unstop or mend the pipe, an action of trespass does not lie; for the right of doing both is incident to the right of pipe.

2 Roll. Abr. 567, (M), pl. 2.

If a man go with men or horses upon land, which lies contiguous to a navigable river, to tow a boat or barge, an action of trespass does not lie; because the doing of this is for the public good.

Ld. Raym. 725, Young's case. [The doctrine here advanced cannot be supported as a general proposition: there is no common law right of towing upon navigable rivers: it can be supported only by usage. *Ball v. Herbert*, 3 Term R. 253.] ¶Vide *Hale de Port. Mar.* 79; 1 Burr. R. 292.¶

¶The public have no common law right, independent of usage, to bathe in the sea, and as incident thereto to cross and recross the sea-shore on foot, and in bathing machines for that purpose; and the owner of the soil of the sea-shore may maintain trespass against persons doing so.

Blundell v. Catterall, 5 Barn. & A. 268.¶ In general the sea-shore is considered as belonging to the public. *Ang. on Tide Waters*, 34; 3 Kent's Com. 347; *Bouv. L. D. Sea-shore.*¶

If J S dig upon the land of J N to raise a bulwark against a public enemy, an action of trespass does not lie; because the doing of this is for the safety of the public.

Bro. *Tresp.* pl. 213.

If J S go into the ground of J N to beat or draw for a fox, badger, or any animal of the vermin kind, in order to hunt it, an action of trespass lies.

2 Bulstr. 62; Cro. Ja. 321.

But if J S pursue a fox, badger, or any animal of the vermin kind, into the ground of J N, and hunt it there, this action does not lie; because the destruction of such animals is for the public good.

2 Bulstr. 62; Cro. Ja. 321; [*Gundry v. Feltham*, 1 Term R. 334, S. P.] ¶3 Term R. 259, n.¶

If, however, the fox, of which J S is in pursuit, run to earth in the ground of J N, and J S dig it out, this action lies; for the fox might have been got out without digging.

2 Bulstr. 62; Cro. Ja. 321.

The point is not perhaps quite settled: but it seems to be the better opinion, that if J S pursue an animal, not of the vermin kind, into the ground of J N, an action of trespass does lie, notwithstanding the animal was found in the ground of J S.

¶It is settled that trespass lies in such case against J S. *Sutton v. Moody*, Lord Raym. 250; and see 7 Taunt. 534.¶

(F) For what Injuries to Real Property Trespass lies.

It is in some books laid down, that if J S, who has started a hare in his own ground, pursue it to the ground of J N, and kill it there, an action of trespass does not lie; because the local property in the hare, which was in J S, is continued by the pursuit.

11 Mod. 75; Godb. 122; Salk. 556.

But it is laid down in other books, that although J S, who has flown a hawk at a pheasant in his own ground, is entitled thereto if it be killed in the ground of J N, if he go upon the ground of J N to take it away, an action of trespass lies. And it is in one book said, that all hunting, except for the destruction of vermin, is unlawful. If this be so, it follows, that every person who hunts an animal not of the vermin kind in the ground of another, is liable to an action of trespass.

Bro. *Tresp.* pl. 111; 2 Bulstr. 61. ||See p. 486.||

If J S, who is entitled to corn growing upon the land in the possession of J N, go thereupon to cut and take it away, an action of trespass does not lie; for *quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud*.

1 Inst. 56.

But if J S do in such case go upon the land and cut the corn before it be ripe, this action lies; it being neither necessary nor proper that corn should be cut before it is ripe.

1 Ventr. 222, Parrot v. Bridges.

If the person, to whom tithe which has been set out belongs, go upon the land on which it is set out, and do what is necessary to prepare it for being carried away, an action of trespass does not lie.

Bro. *Tresp.* pl. 50, pl. 325; Bro. *Dism.* pl. 12.

If J S be about to distrain a beast upon land holden of him, and the tenant, after J S has had a view of the beast upon the land, drive it, in order to prevent it from being distrained, into the land of J N, and J S follow to distrain it there, an action of trespass does not lie.

1 Inst. 161; 2 Roll. Abr. 566, (I), pl. 12.

If J S make coney-boroughs in his own ground, and some conies bred therein do damage in an adjoining ground of J N, and J N kill them, an action of trespass does not lie; because as J S had no property in the conies, which are *feræ naturæ* after they were gone out of his own ground, he is not answerable for the damage done.

5 Rep. 104, Boulston's case; Cro. Car. 554.

||An action of trespass lies for digging up coney-boroughs in a common. Cope v. Marshal, 1 Wils. 51.||

An action of trespass lies for catching fish in a several fishery.

1 Inst. 122; Cro. Car. 554; Salk. 637.

It is laid down, that this action does not lie against a stranger for catching fish in a free fishery; for that, as divers persons have a right to fish therein, no one of them can maintain the action. But Holt, C. J., and Dolben, J., were of opinion, upon the authority of a writ in the register, that any one having a right to fish in a free fishery may maintain this action against a stranger,^(a) who has caught fish therein; and it was said by Holt, C. J., that a free fishery is a very different thing from a common fishery. Giles Eyre, J., was, however, of a contrary opinion; and Carthew,

1 Inst. 122; Cro. Car. 554; Salk. 637; Smith v. Kemp; Carth. 286; Reg. 95; Fitz. N. B. 88. [(a) In the case of Upton v. Daukins, 3 Mod. 97; Comb. 11; and Pecke v. Turner, cited in Carth. 286, in marg., it was holden, that trespass would not lie for fishing in a *free fishery*. However, in the case of the Mayor of Orford v. Richardson, 4 Term R. 439; 2 H. Bl. 182, where the declaration was in trespass, there were counts for fishing in the free fishery, and no objection taken. *Ideo qu.*] [Vide as to distinctions between a several fishery, and free fishery, and common of fishery. Co. Litt. 122 a., n. 7.]

An action of trespass does not lie for fishing in a river where the tide flows; because, as the property in the soil of all such rivers is in the king, all persons have *primâ facie* a right to fish in them.(a)

1 Mod. 105, Anon. [(a) But a man may have, and may in an action of trespass reply to a general defence of this kind, an exclusive and appropriate privilege of fishing even in arms of the sea. Such right indeed is not to be presumed, but the contrary. It may, however, be established by prescriptive usage. 4 Burr. 2162; 4 Term R. 439. Vide *etiam* Hale de Jure Maris, c. 5;] [Ward v. Creswell, Willes, R. 265.] [See title *Pischary*.]

If J S, by digging a ditch in his own land, divert water from the mill of J N, and thereupon J N go upon the land of J S, and fill up the ditch with the earth which was digged thereout, an action of trespass does not lie; because J S was himself the first wrongdoer.

Bro. Tresp. pl. 186; 9 Rep. 55; 2 Roll. Abr. 565, (I), pl. 8.

If J S have a right of common on a piece of land, and J N have a piece of land adjoining to the commonable piece which he is not bound to enclose, and the beast of J S, which was put upon the commonable piece, go upon the land of J N, an action lies; for it was the duty of J S to have prevented this.

Bro. Tresp. pl. 345.

But if J S, who ought to keep up a fence between a close of his and a close of J N, suffer the same to be out of repair, and the beast of J N go through the fence into the close of J S, this action does not lie; because the damage happens from the default of J S.

Bro. Tresp. pl. 192; 2 Roll. Abr. 565, (I), pl. 3. {Vide Addis. 258, Adams v. M'Kinney.}

If J S be driving a beast in a highway, which lies through an open field belonging to J N, and the beast go out of the highway and feed in the field, an action of trespass lies; for J S might easily have prevented this.

Bro. Tresp. pl. 321; 2 Roll. Abr. 566, (K), pl. 1. [But if J S do his best to prevent it, *qu.*, whether trespass lies? and if J N is bound to fence against the highway, and the cattle enter from defect of fences, it is clear the action is not maintainable, provided the cattle were lawfully *passing on the highway*. Dovaston v. Payne, 2 H. Black. 527.]

But, if a beast, which is driving in such highway, do, against the will of the driver, bite a little of the corn or grass which grows by the side of the highway, this action does not lie: because this could not easily have been prevented.

Bro. Tresp. pl. 351; 2 Roll. Abr. 566, (K), pl. 1.

[The defendant with a little dog chased the plaintiff's sheep out of his ground, where they were trespassing, and drove them off his own ground. They went into another man's ground, which had no hedge to divide it from the defendant's grounds, which were contiguous. The dog pursued

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them into the other man's land, so next adjoining. The defendant, as soon as the sheep were out of his own land, called in his dog, and chid him. The owner of the sheep brought an action of trespass for *chasing* his sheep. The court gave judgment, "*quod querens nil capiat per billam*;" being of opinion, that trespass lay not in that case; for they held it to be an *involuntary* trespass; whereas a trespass that may not be justified ought to be done *voluntarily*. They thought he might lawfully drive the sheep out of his own land with his dog; and he did his best endeavour to recal the dog, when they were driven out of it; but the nature of the animal is such, that he cannot be recalled and withdrawn suddenly and in an instant. Therefore trespass did not lie against him for what he had done.

Millen v. Faudrye, Poph. 161.

But where a defendant entered into a close belonging to the plaintiff, where there was no footpath, and adjoining to his paddock, with guns and dogs; and one of the dogs ran into the paddock, and killed a deer; this was considered as an intentional trespass, and not as a mere involuntary accident.

Beckwith v. Shordike, 4 Burr. 2092.] ¶The true distinction between these two cases, it is submitted, does not consist in the one act being involuntary, and the other intentional, (since according to recent decisions *voluntariness* is not necessary to constitute a trespass,) but in the first case the defendant *was doing what was lawful*, in chasing the sheep from his field; whereas in the second the defendant appears to have been a trespasser on the plaintiff's close where there was no footpath. It does not appear whether the defendant in the last case endeavoured to prevent his dog seizing the deer; but had he done so, it is conceived it would make no difference, since he was unlawfully in the plaintiff's close. Vide the judgments of Gibbs, C. J., and Dallas, J., in Deane v. Clayton, 7 Taunt. 516.¶

{ If a turnpike company open a road through the land of a person, without making him a compensation according to law, they are trespassers.

2 Johns. Rep. 190, The People v. The Hillsdale & Chatham Turnpike Co. }

§ Every unauthorized intrusion into the land of another, is a sufficient trespass to support an action for breaking the close, whether the land be actually enclosed or not.

Dougherty v. Stepp, 1 Dev. & Bat. 371. But when tortious acts have been done and no damage has ensued, no action lies. Innis v. Crummin, 1 Mart. N. S. 560; see Ham. N. P. 164, 168; Bouv. L. D. *Trespass*.

One who stands on his own ground or in the street, and, with stones, breaks the house of another, is guilty of trespass *quære clausum fregit*.

Pravitt v. Clayton, 5 Monroe, 4.

A party is justified in entering and placing on the plaintiff's close, goods wrongfully placed by him on the adjoining premises of the defendant.

Rea v. Sheward, 2 Mees. & W. 425.

An entry by A on the land of B, without his permission, to take a chattel belonging to A, is a trespass.

Heermanee v. Vernoy, 6 Johns. 5. See Wells v. Howell, 19 Johns. 385; Adams v. Freeman, 12 Johns. 408.

Where a right or interest in part of the premises is reserved out of the lease, the part so reserved becomes a separate close, for a breach of which the person having the right may maintain trespass.

Van Rensselaer v. Van Rensselaer, 9 Johns. 377.

Trespass lies against a tenant at will for a voluntary waste, as, for cutting down timber.

Phillips v. Covert, 7 Johns. 1; Suffern v. Townsend, 9 Johns. 35.

Wood v. Hyatt, 4 Johns. 313. See Wilde v. Cantillon, 1 Johns. Cas. 123.

A mere executory contract to purchase lands does not confer a right to enter.

Erwin v. Olmstead, 7 Cowen, 229.

Trespass can be maintained by the owner of land through which a road passes, for any unlawful appropriation of such road.(a) In general, the fee of the highway belongs to the owner of the land; the public have only the right of passage.(b)

(a) *Gidney v. Earl*, 12 Wend. 98. (b) *Courtelyou v. Van Brunt*, 2 Johns. 363. See ante, *Highways*, B.g

2. To a Building.

If J S preach in the church of J N, without the consent of J N, an action of trespass lies.

12 Mod. 420, *Turton v. Reignolds*. [See *Revett v. Brown*, 5 Bing. 7.]

¶ Trespass for breaking and entering a chapel and destroying the pews will lie at the suit of a perpetual curate of an augmented parochial chapelry.

Jones v. Ellis, 2 You. & J. 265.

A grant of part of the chancel of the church by a lay impropriator to A B, his heirs and assigns, is invalid in law; and therefore such grantee cannot maintain trespass for pulling down his pews erected there.

Clifford v. Wicks, 1 Barn. & A. 498.]

It is in the general true that an action of trespass lies for going into a man's house, although the door be open; for every man's house is his castle; and he is not obliged to keep the door shut.

Plowd. 71; 2 Roll. Abr. 555, (X), pl. 1; Godb. 283; 2 Roll. R. 208.

If a mother go into the house of J S, the door of which is open, to see her daughter, a servant in the house, who is sick, this action lies.

2 Roll. Abr. 567, (K), pl. 3.

If a beast, in driving it through a street, go into the house of J S, the door of which is open, this action lies.(c)

10 E. 4, 7, pl. 19. [(c) But *qu.* does this case differ from the case of cattle escaping out of a highway into a close through defect of fences, which the owner of the close is bound to repair, in which case they are not distrainable, nor does an action lie. 2 H. Black. 527.]

If a man, whose term in a house is expired, go into it, when the door is open, to take away goods left by him there, this action lies; for it was his own folly to leave the goods there.

Bro. *Tresp.* pl. 430.

If J S go into the house of J N, the door of which is open, to search for goods which he has lost, this action lies; although it be commonly reported that the goods are in the house of J N.

2 Roll. R. 55, 56, *Higgins v. Andrews*; 2 Roll. Abr. 565, (I), pl. 2.

But in some cases an action of trespass does not lie for going into a house, the door of which is open.

If J S have unlawfully gotten goods of J N into his house, and J N go thereinto, the door being open, to take them away, an action of trespass does not lie; because J S was himself the first wrongdoer.

Bro. *Tresp.* pl. 118, pl. 186; Cro. Eliz. 246; 2 Roll. R. 56; 2 Lut. 1385.

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If goods of J S have been stolen, and J S know that they are in the house of J N, and J S go therein, the door being open, to take them away, this action does not lie.

2 Roll. R. 55, 56, Higgins v. Andrews.

If the person, in whom the reversion of a house is, go thereinto, the door being open, to see if any waste be done, this action does not lie.

Bro. Tresp. pl. 16.

||If a tenant omit to deliver possession of his house to his landlord when his term has expired, after a regular notice to quit, the landlord may, in his absence, break open the door, and resume possession, and he is not liable in trespass for so doing.

Turner v. Meymott, 1 Bing. 158; 7 Moo. 574.||

If J S go into the house of J N, the door being open, to tender money, of which a tender to the person of J N is necessary, this action does not lie.

Plowd. 71, Kedwelle v. Brande.

If a man go into a house, the door being open, to part two who are fighting, this action does not lie: the doing of this being for the public good.

Kelw. 46, pl. 2, Anon.

||It was formerly held that an action of trespass lay against an excise officer for entering the plaintiff's house to search for run goods fraudulently concealed, under authority of the commissioners' warrant on the stat. 10 Geo. 1, c. 10, s. 12 & 13, if the officer found no such goods.

Bostock v. Saunders, Black. R. 912; 3 Wils. R. 434.

But it has been subsequently decided that the officers in such case are not trespassers, since their act of search is legal whether goods are found or not, and the only remedy is by action on the case for obtaining and executing the warrant from *bad motives*.

Boot v. Cooper, 1 Term R. 535.

Under a *fieri facias* the sheriff cannot, on *suspicion* of finding the defendant's goods, enter the house of a *stranger*, but he may enter the house of the *defendant*. His justification in the latter case does not depend on his finding or not finding the defendant's goods there; and for this plain reason, that the most probable place to find the goods of the defendant is the house in which he dwells. The sheriff, finding the door open, may enter the house of a stranger, and is justified, *if the defendant's goods are in it*, but it is at his own risk; and where the plaintiff was the husband of the administratrix of an intestate against whose goods in the hands of the administratrix, or of the plaintiff and the administratrix, a *fieri facias* was issued, it was held that the sheriff was justified in entering the plaintiff's house under the writ to search for such goods, although they found none; for the plaintiff's house was the natural place of custody for them.

5 Taunt. 769, Cook v. Birt; 5 Taunt. 765.

Bail above may justify entering the house of A B, (the outer door being open,) wherein their principal *resides*, in order to *seek for* him for the purpose of rendering him; and this, although the principal may not actually be in the house at the time.

Sheers v. Brooks, 2 H. Black. 120.||

And if a barn or an out-house be near unto or parcel of a house, the privilege of the house extends to it.

1 Sid. 186, Penton v. Brown; 1 Keb. 698.

But, if a barn or an out-house stands at a distance from the house, the privilege of the house does not extend to it.

1 Sid. 186, Penton v. Brown.

The privilege of a house, however, only extends to a house in a man's own possession; for if the goods of J S are, to prevent them from being taken in execution, carried into the house of J N, the sheriff may, after declaring the cause of his coming, and demanding to have the door of the house opened, break it open to come at the goods.

5 R. 93, Semaine's case; [and see 6 Taunt. 246; Foster, 320, *ante*, Sheriff, (N). And this is only in case the goods are *actually* there; the sheriff would not be justified by a mere *suspicion* that they were there. 5 Taunt. 769.]

But in some cases an action of trespass does not lie against a sheriff, for breaking open the door of a house.

If, where the king is a party, the sheriff break open the door of a man's house, either to arrest him or to execute a process, this action does not lie, provided he do, before he break open the door, declare the cause of his coming, and demand(a) to have it opened.

5 R. 91, Semaine's case; 4 Leon. 41. [(a) And this demand is necessary in the execution of criminal process against a party guilty of a misdemeanor. *Qu.* whether it is not so in case of felony, and in all cases? Launock v. Brown, 2 Barn. & A. 592. According to Foster, 320, it is necessary. See *ante*, tit. Sheriff, (N).]

If a writ of *habere facias seisinam* of a house, or a writ of *habere facias possessionem*, even at the suit of a private person, be delivered to the sheriff, it is lawful for him, after declaring the cause of coming, and demanding to have it opened, to break open the door of the house to execute either of these; for after the judgment, on which either of these writs must be founded, the house is no longer to be considered as the house of the person in whose possession it is.

5 Rep. 91, Semaine's case.

β After the time has elapsed within which an execution is made returnable, it is of no force, and an arrest under it is no justification.

Stoyal v. Adams, 3 Day, 1.β

If a commission of rebellion, which has issued from the Court of Chancery against J S, be delivered to the sheriff, it is lawful for him, after declaring the cause of his coming, and demanding to have it opened, to break open the door of a house, in which J S is, in order to arrest him.

Crompt. 47.

|| Where an injury to the public has been committed in the shape of an insult to any of the courts of justice, on which process of contempt has issued, the officer charged with the execution of such process may break open doors, if necessary, in order to execute it: and the houses of legislature are not less strongly armed, in point of protection and remedy against contempt towards them, than courts of justice are; therefore the serjeant at arms of the House of Commons, acting in execution of the speaker's

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warrant for the arrest of a member, issued under an order of the House for his committal to the Tower, for a breach of the privileges of the House, is justified in breaking and entering the member's house to arrest him, after an audible notification of his purpose, and a demand made of admission.

Burdett v. Abbott, 14 East, 1; *Burdett v. Colman*, 14 East, 163.¶

If a person who has been arrested escape into a house, it is lawful for the sheriff, after declaring the cause of his coming, and demanding to have it opened, to break open the door of the house in order to retake him.

5 Rep. 93, *Semaine's case*; 2 Roll. Rep. 138; Palm. 54.

If a sheriff have entered into a house in order to execute a writ of *fieri facias*, it is lawful for him, after a demand to have it opened has been made, to break open any inner door or any trunk in the house.

2 Show. 87, *Rex v. Bird*; Palm. 54. [And the law is the same in case of *mesne process*. *Lee v. Gansel*, Cowp. 1;] {5 Johns. Rep. 352, *Williams v. Spencer*.} ¶As to breaking inner doors, and whether a demand is necessary in such case, vide tit. *Sheriff*, (N).¶ And see also Bouv. L. D., *Door*; *House*, §

If, after a sheriff's officer has entered a house in order to execute a writ of *fieri facias*, the master of the house lock the door, it is lawful for the sheriff, after a demand to have it opened has been made, to break it open, for the sake of setting the officer at liberty, or completing the execution.

Cro. Ja. 556, *Anon.*; ¶2 Roll. R. 137; Palm. 52.¶

By the 21 Jac. 1, c. 19, § 8, it is enacted, "That it shall be lawful to commissioners of bankruptcy, or the greater part of them, or to any person, by them or the greater part of them deputed by warrant under their hands and seals, to break open the house or houses, chambers, shops, warehouses, doors, trunks, or chests of the bankrupt where the said bankrupt or any of his goods shall be, or be reputed to be, and to seize the body and goods of the bankrupt."

¶This statute is now repealed; but see this provision repeated in the bankrupt act, 6 G. 4, c. 16, § 27; and see *Eden*, B. L. p. 69.¶

By the 11 Geo. 2, c. 19, § 7, it is enacted, "That where any goods or chattels, fraudulently and clandestinely carried away by any tenant, lessee, or any person aiding or assisting therein, shall be put into any house, barn, stable, out-house, or place, locked up or otherwise secured, to prevent such goods or chattels from being taken as a distress for arrear of rent; it shall be lawful for the landlord, or any person empowered by him, to take as a distress for rent such goods or chattels, (first calling to his assistance the constable or other peace officer of the hundred, borough, parish, district, or place where the same shall be suspected to be concealed, who are hereby required to aid and assist therein; and in case of a dwelling-house, oath being first made before some justice of the peace, of a reasonable ground to suspect that such goods or chattels are therein,) in the day-time; and to break open such house, barn, stable, out-house, and place, and to take and seize such goods and chattels for the said arrear of rent, as he might have done, if such goods or chattels had been in any open field or place."

¶For the decisions on this clause, see *antè*, tit. *Rent*, (K), Vol. viii. p. 495.¶

¶This statute applies to the goods of the tenant only; and therefore a plea justifying the following goods off the premises, and breaking and entering the plaintiff's warehouse to distrain them, must show that they were the tenant's goods.

Thornton v. Adams, 5 Maule & S. 38; and see 3 Esp. Ca. 15; 4 Camp. 136.¶

the cause of his coming and demanding to have it opened, break open the door of a house in which he is, in order to arrest him, an action of trespass does not lie.

5 Rep. 93, *Semaine's case*; *Moor*, 606.

If a peace officer have the warrant of a justice of the peace, for levying upon the goods of J S the penalty of a statute, part of which is given to the king, it is lawful for him, after declaring the cause of his coming, and demanding to have it opened, to break open the door of the house of J S in order to execute the warrant.

2 Jon. 133, 134, *Anon.*

If an affray in a house be seen or heard by a peace officer, it is lawful for him, after declaring the cause of his coming, and demanding to have it opened, to break open the door of the house in order to arrest the affrayers.

Bro. Fauz Impr. pl. 6; 2 Hawk. P. C. c. 14, § 8.

If a person, who has, in the presence of a peace officer, made an affray, flee into a house, it is lawful for the peace officer, after declaring the cause of his coming, and demanding to have it opened, to break open the door of the house in order to arrest him.

Bro. Fauz Impr. pl. 6; 2 Hawk. P. C. c. 14, § 8.

It is lawful for a private person, after declaring the cause of his coming, and demanding to have it opened, to break open the door of a house, in which a person who has committed a felony or given a dangerous wound is, in order to arrest him; the good of the public requiring this to be done.

Bro. Tresp. pl. 330; 2 Hawk. P. C. c. 14, § 7.

It is lawful for a peace officer, having a warrant from a justice of the peace to arrest a person upon a suspicion of felony, after declaring the cause of his coming, and demanding to have it opened, to break open the door of the house in which he is, in order to arrest him.

1 H. H. P. C. 579; *Foet.* 321.

If J S, who is unlawfully confined by J N in his house, in order to regain his liberty, break open the door of the house, he is not liable to an action of trespass; because J N was himself the first wrongdoer.

Bro. Tresp. pl. 186; 2 Leon. 202.

If J S through negligence suffer his house to take fire, and the person who lives in an adjoining house pull down the house of J S in order to preserve his own house, an action of trespass does not lie.

Bro. Tresp. 186. [Vide 6 Ann. c. 31, § 6.]

An action of trespass does not lie for pulling down a house which is a nuisance in a highway.

Comb. 417, *Lovey v. Arnold*.

{Where a man is licensed to do a thing, it necessarily implies that he may do every thing without which that thing cannot be done. Therefore, if A license B to enter his house to sell goods, B may take assistants, if necessary, for the purpose of selling the goods.

Willes, 195, *Dennett v. Grover*.}

||And if a fireman, in throwing down a stack of chimneys which are in

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danger of falling into a public way, unavoidably damage the plaintiff's house, no action lies.

Dewey v. White, 1 Moo. & Malk. Ca. 56.¶

(G) Against whom an Action of Trespass may be brought.

1. *In the General.*

An action of trespass may be brought against a lunatic, notwithstanding he is incapable of design; for wherever one person receives an injury from the voluntary act of another, this is a trespass, although there were no design to injure.(a)

Hob. 14, *Weaver v. Ward*; Bro. *Tresp.* pl. 213, pl. 310; Latch. 13, 110; ¶Hale, P. C. 15, 38. (a) It would be more correct to say, that wherever a person receives an injury by an act of *immediate force* acting on his person or property, it is a trespass, whether voluntary or involuntary.¶

Every party to a trespass is liable to an action of trespass; for there can be no accessory in trespass.

Bro. *Tresp.* pl. 113; 1 Lev. 124.

If A command or request B to take the goods of C, and B do it, this action lies as well against A as against B.

Salk. 409, *Britton v. Cole*. ¶Vide 1 Camp. N. P. C. 187.¶

β A mother is not answerable for a trespass committed by her child, unless done by her command.

M'Cauley v. Wood, 1 Penning. 86.

The commander of a squadron is liable to an action of trespass, for the conduct of those under his command, in case of positive or permissive orders, or of his actual presence and co-operation in the acts.

The Eleanor, 2 Wheat. 345.

The owner of a privateer is liable for the acts of his commander; and the commander is liable for the marine trespasses of his subalterns, when acting within the scope of his commands.

2 Wheat. 345. '

A employed B, an attorney, to enforce the payment of a debt; B directed his agent to sue out a *justicies* in the county court; before the return of the *justicies* the debtor paid the debt and costs to B. His agent, not knowing of such payment, afterwards entered up judgment in the county court, although the defendant had not appeared, and sued out execution under which the goods of the debtor was seized; held, that the agent and B were liable as trespassers.

Bates v. Pilling, 6 B. & C. 38; S. C., 9 D. & R. 44.

Trespass does not lie against the owner of a party-wall by the other part-owner.

Wiltshire v. Sidford, 1 M. & R. 404.

Nor against a sheriff to recover damages for the seizure of property by his bailiff, under a writ of *levari facias* issued in a suit in the county court, because the sheriff, in such case, is a judicial and not a ministerial officer.

Tinsley v. Nassau, 2 C. & P. 582.¶

If J S agree to a trespass which has been committed by J N for his benefit, this action lies against J S, although it was not done in obedience to his command, or at his request.

Bro. *Tresp.* pl. 113, pl. 256.

unless he act voluntarily.

Sty. 65, *Smith v. Slone*.

If divers persons have been guilty of a trespass, the party injured may bring an action of trespass against them all, or against any one or more of them.

8 Rep. 159, *Blackamore's case*; *Bro. Tresp.* pl. 20, pl. 150. .

But if a party injured by a trespass have brought an action of trespass against one of the parties to the trespass, he cannot bring a second action against any one of them : for although the defendant in the second action be a stranger to the record in the first, he may, being a party to the trespass, plead the pendency of the first action in abatement of the second ; or he may plead the acquittal or judgment in the first action in bar of the second.

Cro. Eliz. 667, *Ferrers v. Arden*; 6 Rep. 7; *Carth.* 96; *Hob.* 137.

If J S, who has bailed a beast to J N for a time certain, take it away before the expiration of the time, he is not liable to an action of trespass: for the person who has only a special property in a chattel can never maintain this action against him who has the general property: but the remedy of J N is an action upon the case.(a)

Bro. Tresp. pl. 92. ¶(a) Or an action of assumpsit on the contract of bailment.¶

If J S kill a beast which has been bailed generally to him, an action of trespass does not lie against J S; for by the bailment a general confidence was placed in him; and the remedy for an abuse of confidence is an action upon the case.

Bro. Tresp. pl. 295; 5 Rep. 14; *Cro. Eliz.* 784. ¶But it seems clear that trespass lies in such case, for by the destruction of the beast the bailee's interest is at an end. *Vide ante*, p. 443, note.¶

But if J S kill a beast, which has been bailed to him for a particular purpose, as to plough his land, he is liable to this action; because a general confidence was not placed in him by the bailment.

1 Inst. 57; *Bro. Tresp.* pl. 295; 5 Rep. 14; *Cro. Eliz.* 784.

If a servant, who is intrusted to sell goods in his master's shop, carry any of them away, an action of trespass lies; for the confidence placed in him extends only to the selling of the goods in the shop.

1 Leon. 87, *Glosse v. Hayman*.

If the goods of his master, with which a servant is intrusted, are injured by a mal-feasance of the servant, an action of trespass lies.

Bro. Tresp. pl. 295.

But if, through the neglect of a servant, to whose care the goods of his master are committed, they receive an injury, this action does not lie; but the remedy, the injury arising from a non-feasance, is an action upon the case.

5 Rep. 14; *Ld. Raym.* 188.

If a servant, who by the command of his master has lawfully distrained a horse, use the horse, or kill it, the master is not liable to an action of trespass; but the servant, who by his own tortious act becomes a trespasser *ab initio*, is liable thereto.

Bro. Tresp. pl. 211.

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If a sheriff's officer takes the goods of J S under a writ of *fiery facias*, after he has committed an act of bankruptcy, and afterwards the goods are assigned under a commission of bankruptcy; an action of trespass does not lie against the officer, although the goods do by relation become the property of the assignees from the time of committing the act; for, as the officer might not know that J S had committed an act of bankruptcy, or that an assignment of the goods would be made, and as it was his duty to execute the writ, it would be unreasonable to punish him as a wrong-doer.

1 Lev. 174, Baily v. Bunning; 3 Lev. 192; 1 Show. 12; ||Smith v. Milles, 1 Term R. 475; Cooper v. Chitty, Black. R. 65.||

If the goods of J S are taken by a sheriff's officer, who has a writ of *fiery facias* to levy of the goods of J N, an action of trespass lies against him; because he was only authorized to take the goods of J N.

Bro. Tresp. pl. 564; 2 Roll. Abr. 552, (O), pl. 3, pl. 9; Carth. 381. ||Ackworth v. Kempe, Dougl. 40. The owner of the goods may waive the tort, and bring an action for money had and received for the proceeds of the goods. Cowp. 419.||

An action of trespass does not lie against a sheriff's officer, who under a writ of replevin has taken the goods of J S in the room of the goods of J N, because this writ is different from a writ of *fiery facias*. By the former, the officer is commanded to take certain goods therein specified; by the latter, he is only commanded to levy of the goods of J N.

Carth. 381, Hallet v. Burt.

But if the owner of the goods taken under a writ of replevin, claimed a property in them at the time of taking; and the officer, notwithstanding this claim, carried them away, without having the property determined upon a writ *de proprietate probanda*, this action lies against him.

Carth. 381, Hallet v. Burt. {Or if, in Pennsylvania, the officer takes them away without allowing a reasonable time for the defendant to find security on a claim of property, which in Pennsylvania supplies the place of a writ *de proprietate probanda*. 1 Dall. 225, Hocker v. Stricker. See also, as to justifying under a writ of replevin, 3 Mass. T. Rep. 310, Moors v. Parker.}

If a stranger have officiously assisted a sheriff, or his officer, in the execution of a writ of *fiery facias* which issued upon a regular judgment, he is not liable to an action of trespass; for it is not only lawful, but it is the duty of every man, to assist in the execution of such writ.

10 Mod. 24, Templeman's case.

An action of trespass does not lie against a sheriff or his officer, or against a person who by the command of either of them has assisted him, for any thing done by virtue of a writ of *fiery facias* which issued upon an erroneous judgment; because the fault is not in such case in the sheriff or his officer but in the court or some officer thereof.

Stra. 509, Philips v. Biron; Raym. 73.

But if a stranger have officiously assisted a sheriff or his officer in the execution of such writ, he is liable to this action; because, as he acted voluntarily, it was incumbent upon him to take care that there was a regular judgment to warrant the issuing of the writ.

Stra. 509, Philips v. Biron; Raym. 73. ||Therefore, where an action of trespass is brought against the sheriff or officer and the party to the suit jointly, it is advisable for the sheriff or officer to justify separately, for the writ alone is a justification for them; but the party, or a stranger, must show a regular judgment. And if the justification is joint, and it fails as to the party, it will also be bad for the sheriff or officer. See Stra. 509, 993, 1184.||

facias, although there were no judgment to warrant the issuing of the writ; for as the sheriff and his officer, and the assistant, have only paid obedience to the writ, neither of them ought to be punished as a wrongdoer.

12 Mod. 178; *Britton v. Cole*, Hil. 9 W. 3.

But in a case soon after, it was ruled by Holt, C. J., that in an action of trespass against a sheriff for levying goods under a writ of *fiery facias*, it is incumbent upon the sheriff to give in evidence a copy of the judgment upon which the writ issued.

Ld. Raym. 733, *Lake v. Billers*, Hertford Lent Assizes, 1698. [The distinction seems to be this:—if the action in such case be brought by the party against whom the writ issued, it is sufficient for the officer to give in evidence the writ of *fiery facias* without showing a copy of the judgment; but, if the plaintiff be not the party against whom the writ issued, but claim the goods by a prior execution or sale that was fraudulent, there the officer must produce not only the writ, but a copy of the judgment. For, in the first case, by proving that he took the goods in obedience to a writ issued against the plaintiff, he has proved himself guilty of no trespass; but, in the other case, they are not the goods of the party against whom the writ issued, and therefore the officer is not justified by the writ in taking them, unless he can bring the case within the 13 Eliz., for which purpose it is necessary to show a judgment. Bull. N. P. 234, 91; 5 Borr. 2631; Dougl. 41; 2 Bl. Rep. 1104;] {2 Johns. Rep. 46, *High v. Wilson*; Taylor, 107, *Harget v. Blackburn*. Vide 2 Johns. Rep. 280, *Wilson & Gibbs v. Conine*.} [In *Doe v. Murless*, 6 Maul. & S. 114, where the above distinction was recognised, Bayley, J., said the reason was because the party, against whom the judgment passed, might apply to set it aside, and if he omit to do so, it is to be presumed the judgment is right; and see 1 Bing. 209.]

{If property exempted from taxation is assessed, and a distress made for the tax, the commissioners issuing the warrant to collect it, and the collector distraining, are trespassers.

1 H. Black. 68, *Harrison v. Buleock*; 4 Term, 2, *Williams v. Pritchard*; Ibid. 4, *Eddington v. Borman*; 8 Term 468, *Perchard v. Heywood*. Vide 1 Cain. 92, *Henderson v. Brown*; 1 Mass. T. Rep. 181, *Bangs v. Snow*.}

It is laid down, in divers cases, that if A take the goods of B, and afterwards C take them from A, B cannot maintain an action of trespass against C; because A did acquire a general property in the goods by the first taking, notwithstanding it was a tortious one; and consequently the property of B was divested.

Bro. Tresp. pl. 256, pl. 329, pl. 358.

But it is said in one case, that B may in such case maintain this action against C, for that A did not acquire a general property in the goods by the first taking.

Sid. 438.

Heretofore, if a peace officer had arrested a person under a warrant of a justice of peace, for an offence of which it appeared upon the face of the warrant that the justice had no jurisdiction, he would have been liable to an action of trespass.

2 Hawk. P. C. c. 14; 10 Rep. 76.

But by the 24 Geo. 2, c. 44, § 6, it is enacted, "That no action shall be brought against any constable or other officer, or against any person acting by his order or in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice, until demand hath been made in writing, signed by the party intending to bring such action, of the

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perusal and copy of such warrant, and the same hath been refused, or neglected, for the space of six days after such demand."

¶ Plaintiff appeared before the defendant, a magistrate, to answer the complaint of A, for unlawfully killing his dog; defendant advised plaintiff to settle the matter by paying a sum of money, which plaintiff declined. Defendant then said, he "would convict the defendant under the Trespass act, in which case he would go to prison:" plaintiff still declined paying, and said he would appeal. Defendant then called a constable, and said, "Take this man out, and see if they can settle the matter, and, if not, bring him again, as I must proceed to commit him under the act." Plaintiff then went out with the constable and settled the matter, by paying a sum of money: in an action of trespass for this wrong, held, that this was an assault and false imprisonment for which trespass would lie; and which, as no conviction had been drawn up, the defendant could not justify.

Bridget v. Coyney, 1 M. & R. 211.

Trespass does not lie against a magistrate for any thing done by him under a conviction, unless there is a total want of jurisdiction.

Fawcett v. Fowlis, 7 B. & C. 794; S. C., 1 M. & R. 102.

Trespass does not lie against a magistrate for any thing done by him in the discharge of his duty, unless he be made acquainted with every fact requisite to enable him to determine when called upon to act.

Pike v. Carter, 10 Moore, 376; S. C., 3 Bing. 78.

2. For an Injury to Real Property.

If the person, who has granted the vesture of land in which he has a freehold, disturb the grantee in the enjoyment thereof, an action of trespass lies against him.

Bro. Tresp. pl. 273; *Dyer*, 285.

But if J S have only a right of a free warren in the land of J N, and J N destroy coney-boroughs in the land, this action does not lie against J N, the remedy of J S being an action upon the case.

2 Roll. Abr. 552, (L), pl. 4.

It is in the general true, that an action of trespass lies against the lord of whom land is holden, for an injury done to the land.

2 Inst. 105; *Bro. Tresp.* pl. 16, pl. 273, pl. 344, pl. 384.

But this action does not lie against the lord of whom land is holden for making a distress thereupon; it being by the statute of Marlbridge provided, that if a lord make an unreasonable distress, or make a distress when nothing is due to him, he shall not be liable to a fine, but shall be grievously amerced; whereas if this action would lie, he would be liable to a fine.

2 Inst. 105; *Stra.* 851; *Sayer*, 184. ¶ An action on the case is the remedy for an excessive distress. 2 *Stra.* 851; 1 *Burr. R.* 590; 1 *Barn. & C.* 145. But trespass lies if the landlord in distraining turn the tenant out of possession. 1 *East, R.* 139.¶

It has been holden, that this statute extends to every lord of whom land is holden; although the tenant be only a tenant at will.

Finch. Law. lib. 3, c. 6; 2 Inst. 105; *Bro. Tresp.* pl. 29, 344. ¶ The landlord of a tenant at will may peaceably enter the premises, but an illegal search for stolen goods renders him a trespasser *ab initio*. *Faulkner & Alderson, Gilm.* 221.

But, if a lord's bailiff make an unreasonable distress, or make a distress

person of the lord.

2 Inst. 106.

If the lord of whom land is holden drive a beast, which he has distrained upon the land of his tenant in one county, to the manor-pound in another county, he is not liable to an action of trespass; because, as the tenant is supposed to know where the manor-pound is, he knows where to carry sustenance for his beast.

2 Inst. 106.

If the lord of whom land is holden drive a beast, which he has distrained upon the land of his tenant in one county, to an open pound in another county, an action of trespass does not lie against the lord; but he is liable to an action upon the statute of Marlbridge, because, as the owner does not know to what pound the beast is driven, he does not know where to carry sustenance for it; and consequently the beast, no other person being obliged to do this, may be starved.

¶Vide 2 Taunt. R. 252.¶

It was in one case holden by the Court of King's Bench, that a tenant by copy of court-roll may maintain an action of trespass against his lord for cutting down trees on the land holden by copy of court-roll: and the judgment of this court was affirmed in the Exchequer Chamber. But the judgment was afterwards reversed in the House of Lords; and it was said, that, as a copyholder cannot cut down trees, except for necessary repairs or for estovers, if his lord cannot do this, many good trees must perish, which would be a loss to the public.

Salk. 638, *Ashmead v. Ranger*.

If A disseise B, and C disseise A, and afterwards B re-enter, he may maintain an action of trespass against C, because by the re-entry of B he reduces the possession to himself from the time of the first disseisin.

2 Roll. Abr. 554, *Hoccombe v. Rawlins*; Bro. *Tresp.* pl. 35; Cro. Eliz. 540.

¶A party having the legal title to land, having entered, may maintain trespass against a person wrongfully in possession at the time of entry, and continuing such possession afterwards.

Butcher v. Butcher, 7 Barn. & C. 399; and see 7 Term R. 431.¶

It is laid down, that if a disseisor make a lease or feoffment and afterwards the disseisee re-enter, he cannot, although he thereby reduce the possession to himself from the time of the disseisin, maintain an action of trespass against the lessee or feoffee, because the lessee or feoffee came in by title.

Bro. *Tresp.* pl. 35, 302.

But it has been holden in one case, that the disseisee may, in such case, maintain this action against the lessee or feoffee, notwithstanding the lessee or feoffee came in by title. And the former seems to be the better opinion; for it has been holden in two subsequent cases, that the disseisee cannot, in such case, maintain an action of trespass against either the lessee or feoffee.

Cro. Eliz. 540, *Holcombe v. Rawlins*, Hil. 39 Eliz.; 11 Rep. 51, *Liford's case*, Mich. 12 Jac. 1; Hetl. 66, *Symons v. Symons*, Hil. 3, Car. 1.

{So if B be put into possession of land under a writ of restitution awarded
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on a conviction of forcible entry and detainer by a court having jurisdiction, and while he is in possession, C cuts timber by his license, and the proceedings are afterwards set aside for irregularity and re-restitution awarded, though B may be considered a trespasser by relation, and be made answerable for the damages, trespass will not lie against C, who cannot be made a trespasser by relation.

3 Cain. 261, Case v. De Goes.}

If a tenant for life of land die, and his executor go upon the land within a few days after his death, to remove the cattle of his testator, an action of trespass does not lie against the executor; because, as the time of the determination of the tenancy was uncertain, it is reasonable, that the executor should have a convenient time to remove the cattle.

Cro. Ja. 205, Stodden v. Hervey.

If a lessee for life or years of land, who is not restrained from so doing, cut down trees, an action of trespass does not lie; because the lessee has an interest in the land by the act of the owner, and it was the folly of the owner, that he did not, when he demised the land, restrain the lessee from cutting down trees.

5 Rep. 13, The Countess of Salop's case; Bro. *Tresp.* pl. 480. ||But if the tenant carries them away, trespass or trover lies against him. Cro. Car. 242; 7 Term R. 13.||

A demised a pasture to B, but the trees were excepted in the demise. The cattle of B, which were afterwards put into the pasture, barked the trees. It was ruled by Holt, C. J., to whom the point was referred, that an action of trespass did not lie against B.

Ld. Raym. 739, Glenham v. Hanby. ||No reason is stated in the case for this judgment. It is clear that trespass lies against a tenant for cutting or damaging excepted trees. 4 Taunt. 316; 1 Saund. 322 b, n. 5; Lord Ray. 552.||

||If a tree grow near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which it was first planted.

Holder v. Coates, Moo. & Malk. Ca. 112; and see 2 Roll. R. 141; 1 Ld. Raym. 737; *β* Lyman v. Hale, 11 Conn. 177.*§*

β The general property of trees, felled on land in possession of a tenant for years, after severance, is in the owner of the land; he may, therefore, sustain trespass *de bonis asportatis*, against a stranger, for the carrying away of trees, after severance, so felled.

Bulkley v. Dolbeare, 7 Conn. 232.*§*

An action of trespass does not lie against a tenant at will for an injury to a building or land by him holden, which arises from a mere non-feasance.

5 Rep. 13, The Countess of Salop's case; 1 Inst. 57; Cro. Eliz. 784.

But if a tenant at will cut down trees, or do any other positive injury to a land or a building by him holden, this action lies against him; because every such injurious act amounts to a determination both of his estate and possession.

5 Rep. 13, The Countess of Salop's case; 1 Inst. 57; Bro. *Tresp.* pl. 362; Cro. Eliz. 784.

It is laid down in one case, that if the beast of A, which is agisted by B, trespass in the close of C, it is in the election of C to bring an action of trespass against A or B.

2 Roll. Abr. 546, (B), pl. 1.

If a close in the possession of A lie contiguous to a close in the possession of B, and a close in the possession of C lie contiguous to the close in the possession of B, and a fence between the closes of A and B, which A ought to keep in repair, be out of repair; and a fence between the closes of B and C, which B ought to keep in repair, be likewise out of repair; and the beast of C escape through the fence of B, and afterwards through the fence of A into the close of A, A may maintain an action of trespass against C, because A was only bound to keep his fence in repair against the beasts which B should put into his close, and not against the beasts of all persons which should come into the close of B. But, as the damage which C sustains by the recovery of A against him is owing to the default of B, in not keeping his fence in repair, C may recover a satisfaction in an action upon the case against B.

Bro. *Tresp.* pl. 439; Jenk. Cent. 161; 1 Freem. 379. ||This was not finally determined by the court; and in Hale's notes, F. N. B. 298, (4th ed.) it is said trespass will not lie in such case; and see 1 Freem. 379, (2d ed.)||

§ A person who advises, promotes, or aids the commission of the trespass, is liable, though he were not present at the time when the trespass was committed.

Bell v. Miller, 5 Ohio, 251. §

If a servant, without the knowledge of his master, put his master's beast into the close of J S, this action does not lie against the master; because, by taking upon himself to do this, the servant did acquire a special property for the time in the beast: but the servant is, in consequence of the special property by him acquired, liable to this action.

2 Roll. Abr. 553, (Q), pl. 1. ||But *Qu.* whether the servant, by this unauthorized disposal of his master's beast, could acquire a special property in it? It would seem that the action lies on the ground that the servant by his wilful act, without command of his master, causes the beast to do an immediate injury to J S's close: and it is not necessary to suppose a special property in the servant in order to render him liable. Can a servant who wilfully drives his master's carriage and horses against A B, and thereby becomes a trespasser, be said to acquire a special property in them? Lord Kenyon thought he might. 1 East, 108; and 4 Barn. & A. 590.||

But if a wife, without the knowledge of her husband, put her husband's beast into the close of J S, an action of trespass lies against the husband; because a married woman cannot acquire any property in the goods of her husband.

2 Roll. Abr. 553, (Q), pl. 1.

§ A plaintiff may elect to bring either joint or separate actions against joint trespassers; and he may have separate verdicts and judgments, but can have but one satisfaction.

Wright v. Lathrop, 2 Ohio, 54. See Ellis v. Bitzer, 2 Ohio, 91. §

(H) In what Court an Action of Trespass may be brought.

At the common law the superior courts had not jurisdiction in an action, unless the debt or damages amounted to forty shillings.

2 Inst. 311, 312.

By the statute of Gloucester, c. 8, it is in affirmance of the common law enacted, "That no person shall from henceforth have a writ of trespass before the justices, unless he swear by his faith that the goods taken away were worth forty shillings at the least."

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The sanction of an oath was by this statute added, for the sake of more effectually confining actions in which the damages were under forty shillings to inferior courts; but the consequences of obliging a plaintiff to take an oath of this kind being found very dangerous, the practice of requiring an oath was soon discontinued.

2 Inst. 311.

It is in divers books laid down, that although the statute of Gloucester speaks of a writ of trespass generally, it only means a writ of trespass upon the case; because no inferior court can hold plea of trespass with force. And the doctrine of these books is recognised in a modern case. In an action of trespass, which was brought in the Court of King's Bench, the damages laid in the declaration were only twenty shillings. Upon a demurrer it was objected, that the court had not a jurisdiction, the damage appearing upon the face of the declaration to be under forty shillings; but the objection was overruled. And by the court—If an action for a trespass with force, in which the damage is under forty shillings, do not lie in a superior court, the party injured would be without redress; for a fine cannot be assessed by an inferior court, and consequently an action of trespass does not lie in an inferior court.

1 Inst. 118; 2 Inst. 311, 312; Fitz. N. B. 47; Carth. 108, Lambert v. Thurston.

By the 5 W. and M. c. 12, it is enacted, "That from henceforth no writ, commonly called a *capias pro fine*, shall issue against any defendant against whom judgment has been entered up in an action of trespass *vi et armis*; but the same fine is and shall be hereby remitted and discharged."

Since the making of this statute, it has been the practice of the Court of Common Pleas to insert the words *nihil de fine quia remittitur per statutum*, in entering up judgment in an action of trespass.

Salk. 54.

But a question arising in the Court of King's Bench, soon after the making of this statute, in what manner judgment in an action of trespass ought to be entered up, it was after debate holden, that the clause *quod capiatur pro fine* ought to be entirely omitted; for that, as the statute has discharged the fine, no notice ought to be taken thereof in entering up judgment.

Carth. 390, Linsey v. Clerk, Mich. 8 W. 3; Salk. 54.

In a case not long after in the same court, it is said by two reporters to have been holden, that the clause *quod capiatur pro fine* ought still to be inserted in entering up judgment in an action of trespass.

Ld. Raym. 273, Courtney v. Collet, Mich. 9 W. 3; 12 Mod. 164, S. C.

But this is probably a mistake in these reporters, for another reporter of the same case is silent as to the point; and it seems extremely strange, that the same court should so soon after, and without taking the least notice thereof, depart from what was solemnly determined in the case of Linsey v. Clerk.

Carth. 436.

Although the fine due to the crown be, by the 5 W. & M. c. 12, taken away, and the clause *quod capiatur pro fine* be omitted in entering up judgment in an action of trespass, this action does not even at this day lie in an inferior court.

For by the same statute, § 2, it is enacted, "That the plaintiff in every action of trespass *vi et armis* shall, upon signing judgment therein, over and above the usual fees, pay to the proper officer who signeth the same,

Dated in such manner as fines and fees of this kind have usually been.

As a sum of money is to be paid in satisfaction of the fine due to the crown, and this is to be distributed in the same manner as the fine had usually been distributed, it follows that only such courts as could, before the making of this statute, have assessed a fine, are capable of receiving money in lieu of the fine, or of distributing it as the money heretofore paid as a fine had been usually distributed; and, consequently, that an action of trespass does not at this day lie in an inferior court.

A Circuit Court of the United States cannot take cognisance of an action of trespass *quare clausum fregit* committed on lands within the United States and out of the district in which the court is held.

Livingston v. Jefferson, 4 Hall's Am. Law Journal, 78.g

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1. Of the Writ.

It is laid down in divers books, that if the words *vi et armis* are omitted in a writ of trespass, the writ abates; for that these are words of substance.

Fitz. N. B. 86; Cro. Ja. 443, 526, 536; Cro. Car. 407; Salk. 636.

It has indeed in one modern case been holden, that the words *vi et armis* are words of form,^(a) and consequently that the writ does not abate on account of their being omitted.

1 Saund. 81, Law v. King, Trin. 19 Car. 2. [(a) There was some doubt before the stat. 4 Ann. c. 16, § 1, whether the words were matter of form or of substance, (Com. Dig. Pleader, 3, (M) 7. But now by the 4th Ann. c. 16, § 1, the omission of *vi et armis* is only matter of form, and aided on a general demurrer; and it is cured by verdict by the 16 & 17 Car. 2, c. 8; and the not finding of *vi et armis* in a verdict in trespass is immaterial. 1 Stra. 482; 8 Mod. 1; 1 Saund. 140 a, note (4).]

The determination in this case seems to have been founded upon what is laid down in two old cases. In these it is laid down, that if, upon a demurrer to a special plea in an action of trespass *vi et armis*, the court shall give judgment for the defendant as to the matter specially pleaded, there shall be no further inquiry concerning the force, although issue have been thereupon joined. It is in these likewise laid down, that if the court shall give judgment upon the demurrer for the plaintiff as to the matter specially pleaded, the issue joined upon the force shall not be tried; but a *capias pro fine* shall as well be awarded as if this issue had been found for the plaintiff.

9 H. 6, 13; 1 H. 7, 19.

The determination in the case of Law v. King is not warranted by the two old cases. All that can be fairly inferred from them is, that if there be judgment upon the demurrer that the act justified was lawful, it shall be intended that the force accompanying it was also lawful; or that if there be judgment upon the demurrer that the act justified was unlawful, it shall be intended that the force accompanying it was also unlawful. The consequence of this influence is, that it would in either case be quite nugatory to try the issue joined upon the force; but it does by no means follow, that the words *vi et armis* are words of form.

It is said by Holt, C. J., that since the making of the statute of the

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fifth of W. & M. c. 12, it is not necessary to insert the words *vi et armis* in a writ of trespass; because the writ of *capias pro fine*, which before issued upon a judgment against the defendant in an action of trespass, is thereby taken away.

Ld. Raym. 985, Day v. Musket.

But this *dictum* seems not to be well founded. For by the same statute, § 2, it is enacted, "That the plaintiff in every action, wherein a *capias pro fine* would before the making thereof have issued, shall, upon signing judgment in such action, over and above the usual fees for the signing thereof, pay to the proper officer who signeth the same, the sum of six shillings and eight pence, in full satisfaction of the fine due to the crown, and of all fees due for or concerning the same, to be distributed in such manner as fines and fees of this kind have usually been."

It can never be fairly inferred from this statute, that the necessity of inserting the words *vi et armis* in a writ of trespass is thereby taken away; on the contrary, the insertion of these words seems to be still quite necessary, in order to let in the provisions of the statute, for the payment and distribution of the money, which is to be paid in lieu of the fine thereby discharged.

||Vide note, p. 501.||

It is moreover enacted by the 16 & 17 Car. 2, c. 8, § 1, "That, if any verdict of twelve men shall be given in any action, in any of his majesty's courts of record at Westminster, or in the courts of record in the counties palatine of Chester, Lancaster, or Durham, or in his majesty's courts of great sessions in Wales, judgment thereupon shall not be stayed or reversed for default or lack of form, or by reason of the omission of the words *vi et armis*; provided the cause has been tried by a jury of the proper county or place where the action is laid: but such omission shall be amended."

This clause amounts to legislative declaration that the words *vi et armis* in a writ of trespass are words of substance; for as all defaults in matters of form are by the former general words of this clause declared to be after a verdict amendable, if these are words of form, it is quite nugatory to declare again that the omission of the words *vi et armis* in a writ of trespass shall after a verdict be amended.

If a writ of trespass do not conclude *contra pacem*, it abates; for as every trespass with force is a breach of the peace as well as a private injury, these are words of substance.

Fitz. N. B. 93; Carth. 66; 1 Show. 28; Salk. 636.

If a writ of trespass be sued out in the time of the king that now is, for a trespass committed in the time of a deceased king, the conclusion must be *contra pacem* of the deceased king.

Salk. 641, Day v. Musket; [Rex v. Lookup, 3 Burr. 1901; 6 Bro. P. C. 138.]

The omission of the words *contra pacem* in a writ of trespass is amendable after a verdict. For by the 16 & 17 Car. 2, c. 8, § 1, it is enacted, "That, if any verdict of twelve men shall be given in an action in any of his majesty's courts of record at Westminster, or in the courts of record in the counties palatine of Chester, Lancaster, or Durham, or in his majesty's courts of great sessions in Wales, judgment thereupon shall not be stayed or reversed by reason of the omission of the words *contra pacem*, provided

¶And by the 4 Ann. c. 16, § 1, the omission of these words is aided in all cases except on special demurrer.]

2. Of the Declaration.

1. In the General.

As the complaint in a writ of trespass is general, divers trespasses may be alleged in the declaration upon the writ.

Gilb. Hist. C. P. 3; Bro. Tresp. pl. 112.

And for the same reason, trespasses in different vills may be alleged in the declaration upon one writ, provided the different vills are in the bailiwick of the sheriff to whom the writ is directed.

2 Lill. Pr. Reg. 728.

The plaintiff, in an action of trespass against several persons for a joint trespass, may declare against every one of them separately.

Stra. 420, Bayly v. Raby and others; [5 Term R. 649.]

But if it appear upon the face of the declaration in an action of trespass, that another certain person, as well as the person against whom the action is brought, was a party to the trespass, the declaration is bad for want of having made that person a defendant.

[Hob. 199.] ¶This is an extrajudicial opinion, and seems questionable. Vide note *infra*.]

A declaration in an action of trespass was holden to be bad, because the allegation was that A *simul cum* B committed the trespass, and the action was brought against A only.

1 Leo. 41, Henley v. Broad. {But see 2 Johns. Rep. 365, Rose v. Oliver; 1 Saund. 291 d, note by Serj. Williams.} ¶The Court of Exchequer Chamber held this declaration bad, on the ground stated in the text, (which is got from 2 H. 7, 16, 17;) but it was agreed that the defect was cured by verdict, being only *matter of form*, and therefore the judgment for the plaintiff was affirmed; so that at the present day it could only be objected to on special demurrer. But it is conceived that even then the declaration would be held good, since every trespass is in law several, and if in trespass against A it appear *in evidence* that B jointly committed the trespass, it is no objection; and the defendant cannot even plead nonjoinder in abatement.]

But it was in this case laid down, that if it be alleged in the declaration in such action, that A *simul cum* another person to the plaintiff unknown committed the trespass, the declaration is good; because it is not in the plaintiff's power to make an unknown person a defendant.

If the declaration in an action of trespass be in these words, *quod cum* the defendant did the thing complained of, it is bad: because these words, which are only by way of recital, do not amount to an affirmative charge.

2 Bulstr. 215, Sherland v. Heaton; 2 Lev. 206; 2 Show. 27, 295; Salk. 636; Ld. Raym. 1413; Stra. 115, 1162; {2 Hen. & Mun. 595, Hord's Ex. v. Dishman.}

If the declaration in an action of trespass be in these words, *quare* the defendant did the thing complained of, it is bad; (a) inasmuch as the charge, where the word *quare* is used, it being a word of interrogation, is less affirmative than where the words *quod cum* are used.

Salk. 636, Hore v. Chapman. ¶(a) On special demurrer.]

It has been holden, in the Court of Common Pleas, that although the words *quod cum*, or the word *quare*, be used in the court in an action of

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trespass, the fault is cured by the writ, which is in this court part of the declaration.

Warren v. Lapdon, Barnes, 249; [Douglas v. Hall, 1 Wils. 99; Barnes, 452, S. C.]

It seems however to have been doubted by the Court of King's Bench, whether there are in the writ of trespass words sufficiently affirmative to cure the defect of affirmation in the count, occasioned by the words *quod cum* or *quare*; for in a case not many years before that of Warren v. Lapdon, wherein it had been holden by the Court of Common Pleas that there are, which came before the Court of King's Bench upon a writ of error, the latter court never came to a determination.

1 Barn. 176, Clark v. Lucas. [Qu. the authority in Barnes.]

But, whatever doubt there may formerly have been in the Court of King's Bench as to this point, it is now at an end; for in a case subsequent to the case of Clark v. Lucas it is laid down, that in the Court of Common Pleas the words in the writ of trespass are sufficiently affirmative to cure the defect of affirmation in the count, occasioned by the words *quod cum* or *quare*; [and this, even on a special demurrer.]

MS. R. Smith v. Reynolds, Trin. 10 G. 2, in K. B.; [Andr. 21, S. C.; Bateman v. Fowler, 1 Barnard. B. R. 423; White v. Shaw, 2 Wils. 203;] {1 Mass. T. Rep. 96, Holbrook v. Pratt; 2 Mass. T. Rep. 358, Coffin v. Coffin.}

It has in two cases been holden by the Court of King's Bench, that the declaration in an action of trespass, which is bad by reason of the words *quod cum*, or the word *quare*, being therein contained, may be amended from the bill filed; provided this be sufficient to warrant the amendment; and that the court will not inquire into the time of filing the bill.

Stra. 1151, Wilder v. Handy; Marshal v. Rigs, Ibid. 1162.

[The plaintiff declared in trespass with a *quod cum*, and then went on to another trespass, which was introduced with a *necnon de eo quod*, &c. The verdict was *pro quer.* as to the last part, and *pro def.* as to the trespass under the *quod cum*. It was moved, in arrest of judgment, that the whole was but recital. *Sed per cur.*—We must not extend that exception, which has gone far enough already: the latter part is by way of positive charge, and the finding of the jury has cured it as to the first. The plaintiff must have judgment.

Dobs v. Edmonds, 2 Str. 681.]

The words *vi et armis* ought to be inserted in the declaration in an action of trespass.

Salk. 636; Cro. Ja. 443. β The issue on the *vi et armis* in trespass is only matter of form, and in practice nothing is ever found on that issue. Buntin v. Duchane, 1 Blackf. 57.γ

But the declaration is not bad for want of these words, if the action be brought in the Court of Common Pleas; because, as the writ is in this court part of the declaration, the want of these words in the count is cured by their being in the writ.

1 Sid. 187, Jones v. Pritchard; Lutw. 1510.

|| And the omission of these words is aided in any court of record, except on special demurrer, by the 4 Ann. c. 16, § 1. See *antè*, p. 501. ||

The omission of the words *vi et armis* in the declaration in an action of trespass, although not otherwise cured, is amendable after a verdict: it being by the 16 & 17 Car. 2, c. 8, § 1, enacted, "That if any verdict of

of Chester, Lancaster, or Durham, or in his majesty's courts of great sessions in Wales, judgment thereupon shall not be stayed or reversed by reason of the omission of the words *vi et armis*, provided the cause has been tried by a jury of the proper county or place where the action is laid; but such omission shall be amended."

[Note; this act applies only to those cases that appear on the very face of the declaration to have been evidently intended to be actions of *trespass*; not to those cases where the frame of the declaration and the memorandum is of *an action of trespass on the case*. *Savignac v. Roome*, 6 Term R. 125.] ¶Where a declaration for seduction, framed in *trespass*, omits the words *vi et armis*, the defect is cured by verdict. 4 Dow. & Ry. 215.¶

The venue in an action of trespass may be laid in a hamlet.

Bro. *Tresp.* pl. 115, pl. 371. {If a trespass be committed in a township which before action brought is subdivided, the trespass may be laid in the original township. 1 Cam. 167, *Repaudet v. Crocken*.}

It is in the general true, that the injury for which an action of trespass is brought must be specially alleged in the declaration. But, if the injury arise *ex turpi causa*, as from the debauching of a man's daughter, it is not necessary to allege this specially, because the doing thereof would introduce obscenity into the record.(a)

Sid. 225, *Sippora v. Basset*; Cro. Ja. 534. ¶(a) In the cases in the text, it was held that evidence of debauching the plaintiff's wife or daughter might be given under the "*alia enormia*" in trespass *quare clautum fregit*. But the modern practice is contrary, and these injuries are stated on the record, and the reason in the text savours of excess of modesty. And in B. N. P. 89 a, it is laid down that matter, which may itself be the subject of an action, cannot be proved in aggravation without being stated; and see 1 Stark. Ca. 98; Peake's Ca. 46; Stark. on Evid. 1454.¶

It is laid down in two books, that the declaration in an action of trespass, for taking or injuring a beast or fowl *feræ naturæ*, must show that the beast or fowl was reclaimed; for unless it were reclaimed there could be no property therein.

Fitz. N. B. 86; Dyer, 306. ¶But a man has a property *ratione loci* in hares, rabbits, &c., on his own land, and may maintain trespass for breaking his close and hunting, and taking them. Ld. Raym. 250; 2 Black. Com. 419.¶

But it has been holden in one case, that although it be necessary to show this in an action of *trover* for the beast or fowl, it is not necessary to do it in an action of trespass.

Cro. Car. 18, *Vincent v. Leasney*, Mich. 1 Car. 1. ¶In declaring for taking away a quantity of poultry, consisting of turkeys, geese, ducks, and hens, it is not necessary to state how many there were of each description, the collective value of the whole being stated. *Donaghe v. Roudeboush*, 4 Munf. 251.¶

The former, however, seems to be the better opinion; for in a subsequent case it is laid down, that if an action of trespass be brought for killing a deer, it must appear in the declaration, that the defendant knew the deer to be tame.(b)

Lutw. 1359, *Atkinson v. Hunter*, Pasch. 3 Jac. 2. ¶(b) It is usual to state the deer in the declaration to be "*tame*." 3 Chitt. on Plead. 468. But this seems unnecessary, if it appear to be on the plaintiff's land. See *Sutton v. Moody*, Ld. Raym. 250; and in Cro. Car. 18, the omission to state plaintiff's hawk to be tame, was held cured by verdict.¶

It must be alleged in the declaration in an action of trespass, for an injury done by a bite of the defendant's dog, that the defendant knew the

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dog was accustomed to bite ; because a dog is not by nature a fierce or dangerous animal.

Ld. Raym. 608, *Mason v. Keeling* ; 12 Mod. 335 ; 1 Freem. 534. ¶ In *Mason v. Keeling* the action was on the case, and trespass does not lie for keeping a dog accustomed to bite with a *scienter*. But in case the *scienter* is necessary, see *ante*, *Action on the Case*, Vol. i. ; 1 Barn. & A. 620. ¶ It is a justification to an action brought for killing the plaintiff's dog, that he was chasing and killing the defendant's sheep, *Leonard v. Jenkins*, 9 Johns. 233 ; or that he was ferocious and dangerous, *Putnam v. Payne*, 13 Johns. 312 ; *Maxwell v. Palmerton*, 21 Wend. 407 ; or that he had been bitten by a mad animal. 13 Johns. 312.

For the same reason, if this action be brought for an injury done by a goring of the defendant's bull, it must be alleged in the declaration, that the defendant knew the bull had before gored some person.

Lutw. 90, *Bayntine v. Sharp*. 662 ; Ld. Raym. 110, 1583 ; 1 Freem. 434. ¶ But it seems sufficient to state, that the bull was of a ferocious disposition, and unsafe to be at large, with the knowledge of defendant. 1 Barn. & A. 620.

But if this action be brought for an injury done by a beast belonging to the defendant, which is by nature fierce or dangerous, as a tiger or lion, it is not necessary to allege that the defendant knew the beast had before hurt some person ; because the owner must at his peril keep a beast of this kind confined.

Ld. Raym. 1583, *Rex v. Huggins* ; 12 Mod. 335. ¶ In such case it seems the owner is liable in trespass. 3 East, 596.

It is laid down, that if it appear upon the face of the declaration in an action of trespass for taking or injuring goods, that the goods were in the possession of the plaintiff, this is sufficient, although it be not expressly alleged that they were in his possession.

Sid. 184, *Glasscock v. Morgan*.

It has in divers cases been holden that it must be expressly alleged in the declaration in an action of trespassing, for taking or injuring goods, that the plaintiff had a property in the goods.

2 Lev. 20, 156 ; Cro. Ja. 46 ; *Carlisle v. Weston*, 1 Metc. 26.

The declaration in this action charged the taking of the beasts of the plaintiff, viz., one horse and one hat. The judgment was arrested ; because it was not alleged that the property in the hat was in the plaintiff.

2 Show. 395, *Dannet v. Colligdel*.

The declaration in this action charged the breaking of the plaintiff's close, and taking of two horses there being, and a hundred bushels of oats of the goods of the plaintiff there also being. This declaration was holden to be bad ; because as one sentence thereof is closed by the words *there being*, the words of the proper goods of the plaintiff in the following, notwithstanding the two sentences are connected by the copulative *and*, do not extend to the two horses.

Salk. 640, *Joce v. Mills*.

The declaration in this action, which charged the breaking of the plaintiff's close, and the taking of several loads of corn there being, was holden to be insufficient, because it was not expressly alleged that the corn was the corn of the plaintiff.

1 Ventr. 278, *Holland v. Ellis* ; 2 Lev. 156.

But it is in another case said, that the judgment in the case of *Holland v. Ellis* was arrested merely upon the authority of the precedents ; for that Hale, C. J., said, that if it had been a new case, he should have been of

being was his also.

Ld. Raymond, 239, Foulteroy v. Aylmer.

And in the latter case, wherein the declaration charged a fishing in the plaintiff's several fishery, and the taking of fish, the court inclined strongly to be of opinion, for the reason given by Hale, C. J., in the case of Holland v. Ellis, that the declaration was good, although it was not expressly alleged that the fish were the fish of the plaintiff, for that this ought to be intended.

Ld. Raymond, 239, Foulteroy v. Aylmer.

If an action of trespass be brought in the Court of Common Pleas for taking or injuring goods, it is not necessary to allege in the count that the goods were the property of the plaintiff, provided this be alleged in the writ, for the writ is in this court part of the declaration.

1 Sid. 187, Jones v. Pritchard; Lutw. 1510.

It has been holden, that if some of the goods, charged in the declaration in an action of trespass to have been taken or injured, be alleged to be the property of the plaintiff, and others be not, and there be a verdict for the plaintiff, he may enter a *remittitur* as to those goods which are not alleged to be his, and have judgment as to the residue.

2 Saund. 379, Pinkney's case; Raym. 395, Cutforthay v. Taylor.

It is not necessary for the plaintiff in an action of trespass to show, in his declaration, by what means his property in the goods charged to have been taken or injured was acquired.

2 Bulstr. 288, Willamote v. Bamford.

The quality and quantity of the personal chattel charged to have been taken or injured, must be shown in the declaration in an action of trespass with convenient certainty; otherwise the defendant cannot plead a recovery in a former action, in case a second action be brought for taking or injuring the same chattel.(a)

5 Rep. 34, Playter's case; 2 Inst. 435; 1 Ventr. 53; 2 Salk. 628; Ld. Raym. 1410; Stra. 637; [2 Ld. Raym. 1007; 4 Burr. 2455. (a) The true reason is, that the defendant may be enabled to justify. He cannot justify taking *divers* goods not particularized. 4 Burr. 2455.] [The law does not now require the same precision and certainty as formerly, in describing the goods taken, whether in trespass or trover; if they are described according to common acceptance it is sufficient. See the cases collected in note (1), 2 Will. Saund. 74 a; but it is bad, even after verdict, to say, merely, "divers goods and chattels of the plaintiff," and judgment will be arrested. Ld. Raym. 1410, 1007; 1 Stra. 637; 4 Burr. 2455. And so it has been held in replevin, after judgment by default. Pope v. Tillman, 7 Taunt. 642; 1 Moo. 386, S. C. And where the declaration was for seizing *one hundred articles of furniture*, and *one hundred articles of wearing apparel*, without describing them, it was held bad on general demurrer. Holmes v. Hodgson, 8 Moo. 379.]

The declaration in an action of trespass, which only charged the taking of cattle, was holden to be bad; because it did not show of what species the cattle were.

2 Lutw. 1374, Dale v. Phillipson.

But the declaration in this action for taking a hawk was, although it did not mention the particular kind of hawk, holden to be certain enough.

Cro. Car. 18, Vincent v. Lesney.

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It was holden that the declaration in an action of trespass for taking a parcel of yarn was bad, because the quantity of yarn was not shown.

2 Lev. 195, *Wade v. Hatcher*. [*Sed vide contra*, 2 W. Saund. 74 b, note.]

The plaintiff in an action of trespass declared for breaking his close, and digging and carrying away two acres of his land. The declaration was holden to be bad; because, although it show the extent of the land in which the digging was, it does not show the quantity of the soil which was digged and carried away.

2 Ventr. 174, *Highway v. Derby*.

But if the declaration in this action charge that the defendant's beast broke the close, and eat the peas of the plaintiff, this is sufficient, it being in such case almost impossible to show the quantity of the peas eaten.

Gilb. Hist. C. P. 122.

The plaintiff in an action of trespass declared for breaking and entering his house, and taking several keys belonging to the locks upon the doors of the house. It was insisted, that the declaration, which did not show either the kind or number of the keys, was bad; but it was holden to be good. And by the court—The keys are sufficiently ascertained by the reference to the locks upon the doors of the house.

Salk. 643, *Layton v. Grindall*.

The declaration in an action of trespass charged the breaking of the plaintiff's close, and the cutting down of his thorns to a certain value. At first the court inclined to be of opinion that this declaration was bad, because it did not show the quantity of the thorns; but afterwards, upon looking into precedents, judgment was given for the plaintiff.

Cro. Ja. 435, *Jones v. Wilson*.

The declaration in an action of trespass charged the breaking and entering of the plaintiff's house, and the carrying away of divers quantities of china-ware, earthen-ware, and linen, without setting forth the particular quantity of china-ware, earthen-ware, or linen: on a motion in arrest of judgment, this declaration was holden to be certain enough.

Hobs v. Green, Barnes.

[Upon the authority of the preceding cases, it was adjudged on a special demurrer in trespass for breaking and entering a house, damaging the goods and chattels, wrenching and forcing open the doors, &c., that it was not necessary to specify the goods and chattels, or to state the number of doors forced open: the essential matter of the action was the breaking and entering of the house; every thing else was merely matter of aggravation, and therefore need not be specified.

Chamberlain v. Greenfield, 3 Wils. 292;] 1 B. Moo. (R.) 386.]

It is not necessary to show in the declaration in an action of trespass, (a) brought against a stranger for obstructing a way claimed by the plaintiff over the grounds of J N, a title to the way; because, as the claim is only of an easement, it is sufficient, as against a stranger, to show a possession thereof.

1 Bulst. 47, *Pollard v. Cady*; Hard. 407; Yelv. 147. [(a) Trespass does not lie for obstructing plaintiff's way. The remedy is case; and see note *infra*.]

But if an action be brought against J N for obstructing a way claimed by the plaintiff over the ground of J N, the plaintiff must show in his declaration a title to the way; (b) for although it be sufficient to allege the pos-

Stra. 6, *Vernon v. Goodrick*. [(a) In an action of trespass *vi et armis*, (and that is the action we are now considering,) it can in no case be necessary to set forth a title in the declaration, nor does the case referred to warrant such a position. The point determined there was, that if the defendant plead *liberum tenementum*, it is not sufficient for the plaintiff in his replication barely to traverse the defendant's title; he must show his own title. The author has confounded actions of trespass *vi et armis* with actions of trespass *on the case*. The doctrine advanced in the text, and the clause immediately preceding and subsequent to it, will be found to be applicable only to the latter species of action; and a careful examination of the cases will satisfy us that the court had in view that species of action only.] {See Willes, 508, 619.} ¶But the doctrine in the text is not accurate as applied to an action on the case, which (and not trespass) is the remedy for obstructing the plaintiff's way. It is now settled, that whether the action be against the owner of the soil or a stranger, the plaintiff need not in his declaration set forth a title to the way, but may merely state his possession of a messuage, &c., and that by reason thereof he, of right, ought to have the way, &c. See 2 Will. Saund. 113 a, b, (5th ed.) But if the way is only enjoyed under an agreement or license, and not appurtenant to any messuage, &c., the declaration must be on the contract. Ibid. note (a); *Fentiman v. Smith*, 4 East, 107.¶

If an action of trespass (a) be brought against a stranger for obstructing the plaintiff in the enjoyment of a right of common claimed in the ground of J N, the declaration must show a title to the common, inasmuch as the claim in this case is of an interest in the ground of another.

Hard. 407; Yelv. 147. ¶(a) Trespass does not lie in such case, but an action on the case; and see the preceding note, which applies to actions for disturbance of common.¶

It was in one case doubted whether, as only damages can be recovered in an action of trespass, it be necessary to show in the declaration the value of the thing, for the taking or injuring of which the action is brought.

Cro. Ja. 129, *Wood v. Smith*.

But it is in two subsequent cases laid down, that it is necessary to show this in the declaration in this action.

Sid. 39, *Usher v. Bushel*, Hil. 12 Car. 2; 2 Lev. 230, *Strode v. Hunt*, Trin. 30 Car. 2. ¶It seems bad on special demurrer to omit it. *Mayor of Reading v. Clarke*, 4 Barn. & A. 268.¶

It was doubted, in one case, whether the want of having shown in the declaration in an action of trespass the value of the thing, for the taking or injuring of which it is brought, be after a verdict cured by the statute of the 18 Eliz. c. 4.

Cro. Ja. 129, *Wood v. Smith*.

But it was holden, in a subsequent case, that the omission of having shown this in the declaration is, after a verdict, cured by that statute.

Sid. 39, *Usher v. Bushel*. {See 2 Johns. Rep. 421, n., in which it is said to be cured by pleading in chief.}

It is in the general true, that it must be alleged in the declaration in an action of trespass, that the injury was to the damage of the plaintiff.

But if churchwardens bring an action of trespass for taking or injuring goods belonging to their parish, they have an election to allege that the injury was to the damage of themselves, or that it was to the damage of the parishioners.

Cro. Eliz. 197, *Hammond v. Green*. ¶But if succeeding churchwardens bring trover for a conversion in the time of their predecessors, the declaration must, of necessity, conclude *ad damnum parochianorum*. 9 Will. Saund. 470.¶

The plaintiff in an action of trespass declared for breaking his close, and

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beating his servant. A general verdict being found, and entire damages assessed, it was, upon a motion in arrest of judgment, insisted that the declaration is bad; because the plaintiff has not shown any special damage received from the beating of the servant; but judgment was given for the plaintiff. And by the court—Although the plaintiff cannot recover for the personal injury done to the servant, yet the alleging of this, which may be well done in aggravation of damages, shall not prevent him from recovering for the breaking of his close.

Salk. 6431, Newman v. Smith.

But in another case it is laid down, that unless the damages are in such case assessed for the breaking of the close only, the declaration is bad even after a verdict; because it shall be intended, that the jury assessed damages for the beating of the servant.

10 Rep. 130, Osborne's case.

And in the latter case, the case of Pole v. Gardiner, in which the same had been laid down, as is laid down in the case of Newman v. Smith, is expressly denied to be law.

10 Rep. 130, Osborne's case. ||See 2 Will. Saund. 171 a, (5th ed.)||

Wherever a defect of allegation in the declaration in an action of trespass is supplied by the plea, the defect is thereby cured.

The plaintiff in an action of trespass declared for taking a hook, but he did not allege it to be his hook, or that it was in his possession. The defendant in one plea justified the taking of the hook out of the plaintiff's hand. Upon a motion in arrest of judgment it was holden, that the defect of allegation in the declaration would have been fatal, if the defendant had only pleaded not guilty; but that, as it appears from one plea that the defendant took the hook out of the plaintiff's possession, the defect is not fatal.

Sid. 184, Glasscock v. Morgan.

The declaration in an action of trespass, charged the taking of *quatuor pullos*, but it did not say *pullos equinos*, or add an *Anglicè* colts. It was holden, that the want of certainty in this declaration was made good by one of the defendant's pleas, wherein he justified the taking of four colts.

Lutw. 1492.

||If the plaintiff rely on the loss of lodgers as special damage, he must state their names in the declaration.

Westwood v. Cowne, 1 Stark. Ca. 172.||

2. Of declaring with a *Continuando*.

If a trespass be continued without intermission for a longer time than the space of one day, or if the trespass be repeated on a subsequent day, the party injured may recover in one action of trespass for the first trespass, and in another for the continuance or repetition thereof.

Dyer, 320, Moor v. Brown.

But the party injured is not under a necessity of bringing two actions in either case; for he may in one action, by declaring with a *continuando*, recover a satisfaction for the first trespass, and also for the continuance or repetition thereof.

2 Roll. Abr. 545, (A), pl. 1.

There are two ways of declaring in an action of trespass with a *continuando*.

day mentioned in the declaration.

Co. Entr. 661. *A declaration in trespass for an assault and battery with a plank, "and then afterwards continuing" the assault with a rope, held, not to import a technical continuando, and to be good. Benson v. Swift, 2 Mass. 50.*

This way of declaring is proper, in any case wherein the trespass may have been continued, without intermission, for a longer time than the space of one day.

Fitz. N. B. 91; Co. Entr. 661; Bro. Tresp. pl. 374.

In the other, the plaintiff declares with a *continuando* on divers days and at divers times, from the day on which the first trespass is charged until a subsequent day mentioned in the declaration.

Co. Ent. 648, 658.

This way of declaring is proper, in any case wherein there may have been a repetition of the trespass upon a day subsequent to the day on which the first trespass is charged, or where part of the trespass may have been committed upon one day and part upon another.

Ld. Raym. 240, Fontleroy v. Aylmer. Ibid. 824, 976; Bro. Tresp. pl. 149; Sir Thomas Raym. 396.

{A declaration that the defendant, on a particular day, and at divers other days and times, &c., assaulted the plaintiff, is bad.

Cowp. 828, Mitchell v. Neale; 6 East, 395, English v. Purser. Contra, 2 Bos. & Pul. 425, Burgess v. Freelove; 6 East, 391, Parker v. Ironfield. See 1 Saund. 24, note by Serj. Williams, 2 Mass. T. Rep. 50, Benson v. Swift.}

If the nature of a trespass be such that it cannot have been continued or repeated, the plaintiff in an action of trespass cannot declare with a *continuando*.

Salk. 638, 639, Monkton v. Pashley.

If this action be brought for taking a horse, the plaintiff cannot declare with a *continuando*; because there cannot have been either a continuance or a repetition of the trespass.

Bro. Tresp. pl. 441; 1 Lev. 210.

It is laid down that the plaintiff in an action of trespass cannot declare with a *continuando* for cutting down ten trees; because the trespass cannot have been continued or repeated.

Bro. Tresp. pl. 441; 2 Roll. Abr. 549, (I), pl. 5.

It is laid down in one book that the plaintiff in an action of trespass cannot declare with a *continuando* for breaking his house; because the whole of the trespass must have been committed at the same time.

Bro. Tresp. pl. 374, pl. 441.

But it is in another book laid down, that the plaintiff in this action may declare with a *continuando* for breaking his house.

Fitz. N. B. 91.

For the sake of reconciling these two books, this distinction was taken in one case; namely, That where the first breaking of the house was followed with an ouster, the party injured may declare in an action of trespass with a *continuando*; because by the ouster the trespass is continued: but that where the first breaking was not followed with an ouster, the party injured cannot declare in this action with a *continuando*; because every

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subsequent breaking of the house is a new trespass, and not a continuance or repetition of a former trespass. And in support of this distinction, it was said, that a release of a trespass, which was followed with an ouster, is a release of all trespasses on the premises during the continuance of the ouster; but that a release of a trespass, which was not followed with an ouster, is not a release of a trespass on the premises subsequent to the ouster. But the court was not satisfied with the distinction; and it was said by Powell, J., that a *continuando* in pleading does not always mean a continuance without intermission.

Ld. Raym. 975, *Monkton v. Pashley*; Salk. 368, S. C. [See upon this point, Bull. N. P. 86.]

It is in another case said, that what is laid down in *Brooke and Fitzherbert* may be reconciled, by supposing, that by the breaking of the house in the cases in *Brooke* a total breaking or throwing down thereof is to be intended; for which, as the trespass cannot have been continued or repeated, a declaration with a *continuando* would be bad; but that by the breaking of the house in the case in *Fitzherbert*, a partial and repeated breaking thereof is to be intended, for which a declaration with a *continuando* would be good.

Ld. Raym. 240, *Fontleroy v. Aylmer*

It is laid down in two books, that although the declaration in an action of trespass for the taking of two loads of wheat and five loads of barley, with a *continuando* for the whole time, from the day on which the first trespass is charged until a subsequent day mentioned in the declaration, be not good, a declaration with a *continuando* on divers days and at divers times, from the day on which the first trespass is charged till a subsequent day mentioned in the declaration, is good.

Bro. *Tresp.* pl. 149; 2 Roll. Abr. 549, (I), pl. 6, pl. 7.

It is in another book laid down, that a declaration for the breaking of a house, with a *continuando* on divers days and at divers times, from the day on which the first trespass is charged till a subsequent day mentioned in the declaration, is good; because part of the house may have been broken upon one day and part upon a subsequent day.

Ld. Raym. 240, *Fontleroy v. Aylmer*. β In trespass for acts alleged to have been done between certain days, if the plaintiff proves an act done between those days, he cannot afterwards be permitted to give in evidence an act before the first day. *Peirce v. Pickens*, 16 Mass. 470.

In another book it is said, that in action of trespass for cutting down several acres of wood, a declaration with a *continuando* is good.

Sid. 319.

The declaration in an action of trespass charged the taking of ten loads of wheat, ten loads of barley, and ten loads of oats, on the first day of April, with a *continuando* on divers days and at divers times, from the said first day of April, until the first day of June. Upon a writ of error in this case it was assigned for error that the declaration ought not to have been with a *continuando*, because, it being alleged that all the corn was taken on the first day of April, none of it could have been taken on a subsequent day. The judgment was affirmed. And by the court—Where from the nature of the trespass, as if it be the taking up of a horse, the whole of it must have been committed at once, a declaration with a *continuando* would be ill; but, where from the nature of the trespass, part of it may have been committed upon one day, and part upon another, it shall be intended, in

day first mentioned in the declaration, that part thereof was committed upon another day.

1 Lev. 210, *Butler v. Hedges*, Pasch. 19 Car. 2.

It is indeed said to have been holden in the case of *Ovel v. Langden*, which was subsequent to the case of *Butler v. Hedges*, that in an action of trespass for taking oysters, the declaration with a *continuando* upon divers days and at divers times was bad; for that every taking upon any day subsequent to the day first mentioned in the declaration was a new trespass, and not a continuance of the first trespass.

Ld. Raym. 239.

But the book from which this case is cited, the name of which appears to be *Hovel v. Reynolds*, is quite silent as to this point. Another book, in which this case is reported, is also quite silent as to this point. And in another report of the same case it is said, that the declaration was as to this point holden to be good.

2 Jon. 109, *Hovel v. Reynolds*; 1 Ventr. 329; 2 Show. 196.

The plaintiff in an action of trespass declared for the breaking of his close, with a *continuando* for the whole time, from the day on which the first trespass was charged until the day of exhibiting the bill; but it was not shown on what day the bill was exhibited. *Doddridge, J.*, was of opinion, that the declaration was bad, even after a verdict, for want of showing this; and it was said, that the constant practice is to allege the continuance of the trespass to a day certain.

2 Roll. R. 185; *Sliford v. Goodrick*, 5 Rep. 35.

If in the declaration in an action of trespass the trespass be laid with a *continuando* on divers days and at divers times, the particular days on which the trespass was repeated need not be shown.

Jenk. Cent. 124, pl. 52.

If in an action of trespass the declaration charge a trespass, of which there cannot have been continuance, with a *continuando*, the declaration is bad.

1 Lev. 210, *Butler v. Hedges*; Salk. 639.

If in the declaration in an action of trespass two trespasses are laid with a *continuando*, whereas only one of them could have been continued, the declaration, although entire damages have been assessed, is good after a verdict; for it shall be intended that the damages which are assessed for the continuance, are assessed for the continuance of that trespass which might have been continued.

3 Lev. 94, *Gillam v. Clayton*; Salk. 639; Sid. 375; 2 Show. 196.

¶A declaration, charging that the defendant on a certain day, and on divers other days and times, &c., made an *assault* on the plaintiff, is bad on special demurrer, because an assault is one entire individual act.

Michell v. Neale, Cowp. 828; *English v. Purser*, 6 East, R. 395.

However, in a case where the declaration charged that the defendant, on divers days and times, *assaulted* the plaintiff, the declaration was held good on special demurrer, and the court questioned the authority of *Michell v. Neale*.—But this case is supported by the court in *English v. Purser*, and the distinction taken that in *Burgess v. Freelove* the decla-

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ration used the word *assaulted*, which might mean committing different assaults on different days.

Burgess v. Freelove, 2 Bos. & P. 425; and see 1 Saund. R. 24, n. 1.¶

3. Of the Plea.

1. Of pleading in abatement.

In an action of trespass brought by baron and feme for the battery of both of them, damages to the amount of ten pounds were assessed for the battery of the baron, and damages to the amount of forty shillings for the battery of the feme. It was holden, that as the wife could not join with her husband in an action for the battery of him, the writ abated as to that part: but that it was good as to the battery of the wife, for which the husband and wife had a joint right of action.

Bro. *Tresp.* pl. 190; 9 Ed. 4, 51. ¶Vide tit. *Abatement*.¶

It is laid down that if J S, who has no right of action, have joined in a writ of trespass with J N, in whom there is a right of action, the writ *ipso facto* abates.

Bro. *Tresp.* pl. 190.

Hare and three others having joined in a writ of trespass *quare clausum fregit*, it was found specially by the jury, that only Hare had an interest in the land to which the injury was done. It was holden that the writ *ipso facto* abated.

Cro. Eliz. 143, *Hare and others v. Celey*. ¶The joinder of too many parties as plaintiffs in trespass is fatal on demurrer, or in arrest of judgment, or writ of error, if it appear on the record; and it is a ground of nonsuit if it appear on evidence at the trial. 2 Saund. 116 a; 1 Chitt. on Plead. 57.¶

But in another case, a few years subsequent to the case of *Hare and others v. Celey*, it was holden that the writ is in such case only abateable. In an action of trespass the jury found that two others were tenants in common with the plaintiff. It was holden, that the plaintiff was entitled to judgment. And by the court—As the defendant has omitted to plead in abatement, that the plaintiff is tenant in common with two others who are not named in the writ, he cannot now avail himself of the finding of the jury.

Cro. Eliz. 554, *Deering v. Moor*. ¶That the nonjoinder of one tenant in common, or partner, &c., as plaintiff in trespass, is only the subject of a plea in abatement, see 1 Saund. R. 291 k, and the cases there collected.¶

It is not a good plea in abatement of an action of trespass, that A, the place in which the *venue* is laid, is a hamlet belonging to the parish of B, for the *venue* may be laid in a hamlet.

Bro. *Tresp.* pl. 15, pl. 239, pl. 371.

It is in one case laid down, that if the *venue* in an action of trespass be laid in A in the county of B, without any addition, and there be two vills of the name of A in the county, one of which is called A *over*, and the other A *nether*; and there be no vill in the county of the name of A without addition, this cannot be pleaded in abatement.

Bro. *Tresp.* pl. 14.

But in two other cases in the same book it is laid down, that it may in this case be pleaded in abatement of the action, that there are two vills of the name of A in the county of B, one of which is called A *over*, the

out of a vill or hamlet, called A only, in the county of B.

Bro. *Tresp.* pl. 94, pl. 299.

And the latter seems to be the better opinion ; for in another case in the same book it is laid down, that no such vill in the county as that in which the *venue* is laid, is a good plea in abatement of an action.(a)

Bro. *Tresp.* pl. 19. ||(a) But since the statute 4 Ann. c. 16, § 6, which directs the jury in *civil* cases to be taken from the body of the county, it is held sufficient to state the county in the declaration, without any place at all. *Ware v. Boydell*, 3 Maul. & S. 148. And if the place only be stated, it will be referred to the county in the margin, even though another county has been mentioned before. 1 Saund. R. 308 a.||

The pendency of a former action cannot be pleaded in abatement of a second action of trespass, until the plaintiff has declared in both actions ; because, as the writ of trespass is general, it cannot be known, until the cause of action is ascertained in both actions by the declarations that the second action is brought for the same cause as the first.

5 Rep. 61, *Sparrie's case*. ||See note (A), 5 Rep. 62 a, (ed. 1826,) and cases there collected ; and 2 Chitt. on Pleading, 452, note (r).||

And for the same reason, the defendant cannot plead in abatement of an action of trespass for taking goods, that there is an action of replevin depending for the taking of the same goods until the plaintiff has declared in both actions.

. 5 Rep. 61, *Sparrie's case*.

2. Of pleading in Chief.

1. The General Issue.

The general issue is a proper plea for the defendant in an action of trespass, in case the plaintiff had no property in the personal chattel, for the taking or injuring of which the action is brought ; because, unless it be proved, that the plaintiff had either a general or special property in the chattel, he is not entitled to recover.

Bro. *Tresp.* pl. 34, pl. 382.

But it is not always proper for the defendant in an action of trespass for breaking the plaintiff's close to plead the general issue, although the freehold of the close were in the defendant. For in some cases the person who is in the possession of a close may recover in this action against the person in whom the freehold is.

Bro. *Tresp.*, pl. 273 ; Pl. 361 ; Dyer, 285. ||But title in the defendant *may* in all cases be given in evidence under the general issue ; and if the plaintiff claims a possessory interest under the defendant, he may give that in evidence to rebut the defendant's case ; and the defendant, on the other hand, may show that such possessory interest is determined. It may, however, be *advisable* in some cases to plead title in defendant specially, in order to compel the plaintiff to set out his title on the record. It is also sometimes advisable to plead specially without the general issue, in order to give the defendant's counsel the opening and general reply at the trial. See 3 Campb. 366.||

||The rule as to the application of the general issue in trespass is more simple than in some other actions. In trespass to the person nothing can be given in evidence on the general issue, but what shows that the defendant did not commit the trespass on the plaintiff's person complained of. In trespass to personal and to real property nothing can be given in evidence on this plea, but what shows either that the defendant did not commit a trespass on the chattel or close in question at all, or that such

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chattel or close was not the plaintiff's. All matters admitting the trespass in fact to have been committed must be specially pleaded.

Co. Lit. 282 b; Cowp. 478; 7 Taunt. 354; 8 Taunt. 403; Willes, 222; 2 East, 88; 2 Camp. N. P. C. 378, 500; Stephen on Pleading, p. 278; 1 Chit. on Pleading, 493.]

2. A Special Plea.

The defendant in an action of trespass cannot plead any matter specially which amounts to the general issue.

In the declaration in an action of trespass it was alleged, that the trespass was committed at A in the county of B. The defendant justified the act complained of at C in the county of D, and traversed the having done it at A in the county of B. It was ordered that the general issue should be entered, because the plea amounted thereto. And by the court—The defendant ought to have pleaded the general issue; for the jury cannot, as the trespass charged is local, find him guilty, unless it be proved that he committed it at A in the county of B.

Bro. *Trav.* pl. 14; Bro. *Tresp.* pl. 19; Bro. *Attaint.* pl. 104.

The defendant in an action of trespass pleaded, that the personal chattel, for the taking of which it was brought, was not the property of the plaintiff. The general issue was ordered to be entered; because this plea amounted thereto.

Bro. *Tresp.* pl. 34.

But it has been holden, that the gift of a personal chattel may be pleaded in an action of trespass for the taking thereof: for that this, although it be a denial of the plaintiff's property, does not amount to the general issue.

Bro. *Tresp.* pl. 27.

If an action of trespass be brought by J S, for the beating of J N, his servant, by reason whereof he lost the service of J N, the defendant cannot plead that J S did not lose the service of J N; because, as J S cannot recover unless the loss of service be proved, this plea amounts to the general issue.

Bro. *Trav.* pl. 378.

The defendant in such action may plead, that J N was not the servant of J S, at the time of the beating; for this plea does not amount to the general issue.

Bro. *Tresp.* pl. 34, pl. 326.

If one matter, which amounts to the general issue, be joined in the same plea with another matter which amounts only to a justification, the plea is good.

3 Lev. 41, Thomas v. Nichols.

||Every special plea in justification states circumstances which either excuse the fact complained of, or show it to be lawful. From its nature, therefore, it must confess the fact; otherwise it is no justification, but a denial of the fact, and amounts only to the general issue, and is bad, on special demurrer.

3 Term R. 298; 1 Will. Saund. 27, note (1); 6 East, 583; 2 Will. Saund. 159, a, note (10); and see 8 East, 311; 4 Barn. & C. 552.||

The books are not agreed as to what is proper to be done by the plaintiff, where the matter specially pleaded by the defendant in an action of trespass amounts to the general issue.

In some of them it is laid down, that the plaintiff cannot in this case de-

In others it is laid down, that a special plea, where the matter specially pleaded amounts to the general issue, would, it being defective in form, before the statute made in the twenty-seventh year of the reign of Queen Elizabeth, have been bad upon a general demurrer, and that it is so at this day upon a special demurrer.

10 Rep. 95; Cro. Eliz. 146, 319; Cro. Ja. 319; Cro. Car. 157; 1 Sid. 106. ¶Vide 6 East, R. 583; 8 East, R. 311, that such a plea is bad on special demurrer, 2 Saund. 159 a.¶

As it has been already shown, in treating of the injuries for which an action of trespass lies, in what cases this action does not lie for an act which is in the general a trespass, on the account of some particular circumstance attending the act; it is in this place sufficient to say, if any circumstance make an act, which is in the general a trespass, lawful or excusable, this may be pleaded specially in an action of trespass.

If the circumstance, which is specially pleaded in an action of trespass, make the act complained of lawful, it is proper to plead this circumstance in justification; and it is not in this case necessary for the defendant to show that the act complained of was not done voluntarily; for a plea in justification is not founded upon a supposition that the act was accidental.

Hob. 134, *Weaver v. Ward*.

If the circumstance which is specially pleaded in an action of trespass do not make the act complained of lawful, and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to show not only that the act complained of was accidental, but likewise that it was not owing to neglect, or want of due caution.

Hob. 134, *Weaver v. Ward*.

If, at the instant a soldier discharges his gun in exercising, a person runs across and is wounded, the defendant cannot plead in justification of the wounding: and if he plead in excuse thereof, all the circumstances must be shown, that the court may judge whether the wounding were owing to want of due caution.

Hob. 134, *Weaver v. Ward*.

¶In trespass for throwing water over plaintiff and her apartments, it is no plea that the plaintiff was engaged in obstructing the ancient window of the defendant's house, and defendant threw the water to prevent it.

Simpson v. Morris, 4 Taunt. 821.

To trespass for assault and battery, defendant may plead that plaintiff, with force and arms and with a strong hand, endeavoured forcibly to break and enter the defendant's close, whereupon defendant did then and there resist such entrance, and did then and there defend his possession as it was lawful for him to do; and if any damage happened to plaintiff, it was in defence of possession of defendant's close.

Weaver v. Bush, 8 Term R. 78.¶

If the defendant in an action of trespass plead several matters in justification, any one of which is a good justification, the plea is good, although the others are not so.

Jenk. Cent. 184, pl. 77. ¶And so also although the others are not proved. *Spilbury v. Micklethwaite*, 1 Taunt. 146.¶

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If two defendants in an action of trespass join in a plea of justification, which is a good justification of only one of them, the plea is bad as to both; for a joint plea cannot be good as to one defendant, and bad as to the other.

Stra. 509, *Philips v. Biron*; 1 *Saund.* 28; [*Smith v. Bouchier*, 2 *Stra.* 993; *Ca. temp. Hardw.* 62, *S. C.*; *Middleton v. Price*, 2 *Stra.* 1184; 1 *Wils.* 17, *S. C.*; *Parsons v. Lloyd*, 2 *Bl. Rep.* 845; *Perkins v. Procter*, 2 *Wils.* 382, all *S. P.*; *Cole v. Hindson*, 6 *Term R.* 234;] {*Willes*, 15, *Rowe v. Tuttle*; *Ibid.* 32, *Moravia v. Sloper*; *Ibid.* 122, *Morse v. James*; 2 *Cain.* 108, *Schermerhorn v. Tripp*; 3 *Mass. T. Rep.* 310, *Moors v. Parker*.}

¶ If there be several defendants in an action of trespass, and they plead separately, the cause may be tried separately; but if they go to trial jointly, and a verdict is given against them, they cannot afterwards object to it as error.

Sere v. Armitage, 9 *Mart. Lo. R.* 394.

Plea of former recovery and execution by the plaintiff, against a joint trespasser; on demurrer held to be a bar to the action.

Davis v. Scott, 1 *Blackf.* 169.

Every special plea in an action of trespass must confess that the act complained of has been done.

Salk. 638, *Gibbon v. Papper*; 1 *Saund.* 28.

It is in the general true, that if the plea in an action of trespass, which is brought for taking goods, justify the taking of the goods, it must confess that the property was in the plaintiff.

Salk. 640, *Joce v. Mills*.

But if the defendant in such action plead in justification, that he took the goods as a distress for rent in arrear, it is not necessary to confess that the property in them was in the plaintiff; for the goods of any person, if found upon the premises, may be distrained for rent in arrear.

Salk. 640, *Joce v. Mills*.

It is laid down, that it is not necessary for a sheriff's officer, who justifies in an action of trespass under the warrant of the sheriff, to show in what place the warrant was issued; for that this, if it be made necessary by the replication, may be shown in the rejoinder.

Bro. Faux Impr. pl. 12.

But it is said that an officer who justifies in an action of trespass under the warrant of a justice of the peace, must show at what place the warrant was issued.

1 *Roll. Rep.* 135, *Wilson v. Dodd*.

If the person, at whose suit a writ of *fieri facias* has issued, justify in an action of trespass under the writ, he must show the judgment upon which it issued; because, if the judgment were not regular, he is liable to the action.

Carth. 443, *Britton v. Cole*; *Stra.* 509.

Every person who has assisted in the execution of a writ of *fieri facias* must, if he justify in an action of trespass under the writ, unless he acted by the command or at the request of the sheriff or his officer, show the judgment upon which it is issued; for, if he acted officiously, it was incumbent upon him to take care that the judgment was regular. But if a sheriff or his officer, or a person acting by the command or at the request of the

writ issued; because the writ was a sufficient justification to every one of these, although the judgment were not regular.

Carth. 443, Britton v. Cole. {3 East, 133, 142, Grant v. Bagge. See Willes, 128, 129, Morse v. James.} ¶For the true distinction as to cases where it is necessary to prove the judgment, and where not, vide *ante*, p. 495.¶

[If, in trespass for taking the goods of A B, an officer justify, that he took them under a *distringas* against C B, (meaning the said A B,) to compel an appearance, averring that A B and C B are the same person, the plea is bad; for it does not state that A B appeared in the action, and omitted to plead the misnomer in abatement.

Cole v. Hyndson, 6 Term R. 234;] {8 East, 328, Shadgett v. Clipson.}

{But if a defendant sued by a wrong name appear and neglect to plead in abatement, the officer may justify under a *capias ad satisfaciendum* or a *feri facias* issued on the judgment, averring him to be the same person who was sued.

2 Stra. 1218, Crawford v. Satchwell; 1 Mass. T. Rep. 76, Smith v. Bowker.}

It is not necessary for the defendant in an action of trespass, who justifies an imprisonment under a *capias* of an inferior court, to set out all the proceedings in that court; or to show that the cause of action in the inferior court arose within the jurisdiction of that court.

Sayer, 82, Adams v. Freeman and Wynne. ¶But the *party* to the suit in the inferior court must in his justification show that the cause of action arose within the jurisdiction. Willes, R. 30; 6 Term R. 245; 4 Taunt. R. 48. And as to the mode of setting out the proceedings, vide 1 Saund. R. 92, *noté*; 2 East, R. 260.¶

[So, if a defendant justify under a *capias* out of a base court, in an action of debt, and show that the plaint was levied *et taliter processum fuit*, that the *capias* issued; it is sufficient, without showing that a summons issued before the *capias*.

Adams v. Freeman, 2 Wils. 5; Willes, 30.]

¶A defendant in an action of trespass for false imprisonment, pleading a justification under mesne process sued out by him in a cause in which he was plaintiff, may state that the writ issued on an affidavit to hold to bail, without setting forth the cause of action; for if the arrest had been malicious and without cause, he might have been sued for maliciously holding to bail.

Belk v. Broadbent, 3 Term R. 183.

In justifying a trespass under the process of a foreign court, it seems that the plea should be framed in analogy to similar justifications under the process of our inferior courts; but at any rate, a plea which only states that the court abroad was governed by foreign laws, and that the property seized was within its jurisdiction, that certain legal proceedings were had according to such foreign laws against the property in question in such court, having competent jurisdiction in that behalf, *et taliter processum est*, that the defendant was ordered by the court, having competent authority in that behalf, to seize the property, is bad; being too general, and not giving the plaintiff notice whether the defendant justifies as an officer of the court, or party to the cause, or of what nature the charge was, or by whom instituted, or what the order of seizure was, whether absolute or *quousque*, &c.

Collett v. Lord Keith, 2 East, 260.]

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If the defendant in an action of trespass justify under a prescription to dig stones for certain repairs, he must show that the stones dug were used for such repairs.

3 Lev. 323, Danby v. Hodgson.

[If J S justify under a right to enter a common to dig for and carry away sand and gravel for the repairs of a house, he must allege that the house was out of repair, that he entered for the purpose of digging for and carrying away sand and gravel for the necessary repairs of that house, and that the materials were used for that purpose.

Peppin v. Shakespear, 6 Term R. 748.]

||A plea to an action of trespass for breaking the plaintiff's close, that over and across the close, &c., was a common and public highway for, &c., to pass along at pleasure on payment of a certain toll, is not inconsistent or contradictory; particularly if not stated to be immemorial; for it may be a highway created by act of parliament.

Sutcliffe v. Greenwood, 8 Price, 535; and vide 8 Term R. 606.

A plea that defendant was seised in his demesne as of fee, &c., and that he and all those whose estate, &c., have a right of way for himself, his and their farmers and tenants, *occupiers*, &c., is good, without alleging that the defendant is occupier.

Stott v. Stott, 16 East, 343; and vide Proud v. Hollis, 1 Barn. & C. 8; 2 Dow. & Ry. 31, S. C.]

If J S justify in an action of trespass the breaking down of a gate erected in the yard of J N, through which he had a right of passage, he must show that the gate was locked, or otherwise fastened, so as to make the breaking necessary.

3 Lev. 92, Sprigg v. Neal.

The declaration in an action of trespass charged the chasing of a beast *ita quod* it died of the chasing. The defendant justified the chasing, but gave no answer as to the dying of the beast. This plea was holden to be bad.

Cro. Eliz. 384, Hill v. Prideaux, Pasch. 37 Eliz.

In two subsequent cases a contrary doctrine is laid down. In one of these this case is denied to be law; and it is in both of them laid down generally, that it is not necessary for a defendant to give any answer to what is alleged under an *ita quod* or a *per quod*; because this is only alleged in aggravation of damages.

1 Lev. 283, Leech v. Midgley, Hil. 21 Car. 1; Salk. 459, Lodie v. Arnold, Mich. 9 W. 3.

[In trespass for taking cattle, and keeping them so closely in pound that one of them died, the defendant pleaded first the general issue to the whole; and then justified the taking and impounding them damage-feasant; the plaintiff replied *de injuriâ propriâ*, and thereupon issue was joined. The jury found for the plaintiff on the first issue, and for the defendant on the justification. But it was ruled, that judgment should be entered up for the defendant; for the justification was an answer to the whole trespass, viz., the taking and impounding; the dying of the beast being merely matter of *aggravation*: and if the plaintiff would have insisted upon the abuse of the distress, he ought to have stated it in his replication.

Gates v. Bayley, 2 Wils. 313.

issue, and justified under a prescriptive right to distrain for toll, which was found for him; but on the general issue the plaintiff had a verdict. A motion was made to enter up judgment for the plaintiff, notwithstanding the defendant had proved his justification, because it did not cover the whole trespass, namely, the conversion. But the court held, that as the defendant's plea had fully answered the *gist of the action*, which was the taking, the conversion being only aggravation, it became necessary for the plaintiff to reply, that the defendant afterwards converted, &c., and thereby became a trespasser *ab initio*.

Fisherwood v. Concanen, Hil. 5 G. 3, C. B., cited in 3 Term R. 297; *Dye v. Leatherdale*, 3 Wils. 22, S. P.

So, in trespass for breaking and entering the plaintiff's house, and expelling him therefrom, the defendant need only justify the breaking and entering; if the plaintiff would take advantage of the expulsion, he must new assign it.

Taylor v. Cole, 3 Term Rep. 292;] [and see *Monprivatt v. Smith*, 2 Camp. N. P. C. 175.]

If an award be pleaded in an action of trespass, with a *protestando* that the defendant is ready to perform it, this is a good plea; for, as an action of debt will lie upon the award, it is not necessary to show that it has been performed.

Bro. Tresp. pl. 69; *Bro. Accord*, pl. 3, pl. 6.

But if an accord with satisfaction be pleaded in this action, the defendant must show that the satisfaction has been made; this being the material part of his defence.

Bro. Accord, pl. 6.

It is not sufficient for the defendant in an action of trespass, who has pleaded an accord with satisfaction, to show that the money, which by the accord was to have been paid, has been tendered to the plaintiff; because, unless the money has been in fact paid, the plaintiff cannot be said to be satisfied.

9 Rep. 79, *Peyton's case*; *Bro. Accord*, pl. 6, pl. 7. [See the cases in the notes to 9 Rep. 79, (ed. 1826.)]

It is no plea in an action of trespass, that it was agreed between the plaintiff and the defendant, that the goods which the latter had taken from the former should be restored, and that they were restored; for by the restoration of the goods no satisfaction was made for the tort in taking them.

Dyer, 326; *Fitz. Accord*, pl. 3, pl. 4.

It must appear that the satisfaction which is pleaded in an action of trespass, was not only beneficial to the plaintiff, but that the making thereof was attended with some expense to the defendant.

Bro. Accord, pl. 1; *Fitz. Accord*, pl. 3, pl. 4; *Dyer*, 356.

It is not a good plea in an action of trespass, that it was agreed between the plaintiff and the defendant that the latter should, as a satisfaction for the trespass, make up a difference between the plaintiff and J S, and that the defendant did make it up; unless it be shown, that the making of this up was attended with some expense to the defendant.

Fitz. Accord, pl. 1.

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A satisfaction, although there have been no accord, may be pleaded in an action of trespass: but it must be shown that the plaintiff accepted of the satisfaction.

2 Roll. Abr. 569, (R), pl. 1.

It is a good plea in this action, that the defendant gave the plaintiff a bottle of wine as a satisfaction, and that the plaintiff accepted thereof as a satisfaction, although there have been no accord.

Bro. *Accord*, pl. 8.

A satisfaction, although it were made in consequence of an accord, may be pleaded in an action of trespass without pleading the accord; for the satisfaction is the material thing.

Bro. *Bar*. pl. 22; 9 Rep. 80.

And it is a much safer way, although there have been an accord, to plead the satisfaction without the accord; for if the accord be pleaded, this, although it were not necessary to have been pleaded, becomes material; and, consequently, the plaintiff has an election to traverse either the accord or the satisfaction.

Bro. *Trav*. pl. 179.

The pleading of an accord moreover lays the defendant under a difficulty: for if this be pleaded, every circumstance which attended the making thereof must be shown with great precision.

Bro. *Bar*. pl. 22; 9 Rep. 80.

|| Accord, without satisfaction, is not a good plea; therefore it is a bad plea that plaintiff and defendant agreed together to settle all matters in dispute, and to bind themselves in a penalty not to sue each other.

James v. David, 5 Term R. 141.||

If there have been parties to a trespass, and one of them have made a satisfaction, the other two may plead this in bar of an action for the trespass.

Shep. Abr. 1043.

If a man be amerced in the lord's court for a trespass done to the lord, and the money amerced be paid or levied, and received by the lord, the payment or levying of the money, and the receipt thereof, may, although the amercement were illegal, be pleaded in satisfaction, in case an action of trespass be brought.

2 Roll. Abr. 569, (R), pl. 1.

|| The satisfaction must move from the defendant, and must not be an illegal one. Therefore where magistrates, to an action of trespass for assault and imprisonment, pleaded that a charge had been made before them against the plaintiff for an offence against the toleration act, 1 W. & M. c. 18, and that, under that act, they had committed the plaintiff, for want of sureties, till the next sessions, and that, before the next sessions, it was agreed between the prosecutors and the plaintiff, with the consent of the committing magistrates, (the defendants,) that the prosecution should be dropped, and the plaintiff discharged; and that the plaintiff was accordingly discharged in full satisfaction and discharge of the assault and imprisonment: it was held, that this was no legal satisfaction; for either the agreement was illegal for stifling a prosecution for a public misdemeanor, or the satisfaction, if any, was moving from the prosecutor only; and not

Edgecombe v. Rodd, 5 East, R. 294. Vide tit. *Accord, &c.*]

If a license be pleaded in an action of trespass, it must be shown that this was granted by a person having power to grant it.

Cro. Eliz. 245, Taylor v. Fisher; Bro. Tresp. pl. 295.

An action of trespass being brought for taking a gelding, the defendant pleaded, that for fear of his life, which twelve armed men threatened to take away if he did not do it, he took the gelding. This was holden to be a bad plea. And by Roll, C. J.—If a defendant could in this manner excuse himself, the injured party would be without redress; for the men who threatened the defendant are not liable to make a satisfaction to the plaintiff.

Sty. 72, Gilbert v. Stone.

It was heretofore holden, that never accoupled in lawful marriage was not a good plea in an action of trespass for taking away a wife with the goods of her husband; because this action lies, although there has been only a marriage *de facto*.

2 Roll. Abr. 551, pl. 1. But *quære*, Whether this plea would not be good since the marriage-act?

If a release have been given to one party to a trespass, any other party thereto may plead this in bar of an action of trespass; but it must be pleaded with a *profert in curia*; and there must be an averment that the trespass complained of is the same that was released.

Hob. 66, Cock v. Jenour. [Sed *quære*? for the trespass is several in its nature, and the plaintiff may sue one trespasser alone, and he shall not have contribution against the other. It seems, however, that satisfaction accepted from one of several tort-feasors is a discharge to all. 3 Taunt. 119.]

A conviction upon a statute for an offence may be pleaded in an action of trespass for the offence.

Salk. 181.

In every action of trespass *quare clausum fregit*, the defendant may plead, that the place in which the trespass is charged is his freehold.

Salk. 453, Helvis v. Lamb. {See on this point Willes, 218, Lambert v. Stroother. —Or he may give it in evidence on *not guilty*. 1 Leon. 301, Diersby & Nevel's case; Gilb. Ev. 255, (231); Andr. 108, Bartholomew v. Ireland; 7 Term, 354, Dodd v. Kyffin; 8 Term, 403, Argent v. Durrant; 1 Mass. T. Rep. 159, Monumoi v. Rogers; 4 Johns. Rep. 150, Hyatt v. Wood. Vide Peake, N. P. 67, Philpot v. Holmea.—If a person having a legal right of entry on land enters *by force*, though he may be indicted for a breach of the peace, yet he is not liable to an action of trespass brought by the person who has no right, and is turned out of possession. 4 Johns. Rep. 150, Hyatt v. Wood.}

In trespass for breaking the plaintiff's close, treading down the grass, beating his horses, beating his servant, and beating him, &c., the plea of *liberum tenementum*; the defendant must answer the beating of the plaintiff, his servants, &c.

Tribble v. Frame, 3 Monroe, 13.g

¶These pleas of freehold in actions of trespass seem a little absurd, and if they had not prevailed for so many years, I should be of opinion that they were not good pleas. For every plea in bar (admitting the fact pleaded to be true) ought to be a full bar to the action; but this is plainly not so: for though the place in question be the defendant's freehold, the

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plaintiff may have a good cause of action, as if he hold by leave under the defendant, or under another person who conveyed the reversion to the defendant, or even though he has no right at all, if he has been in quiet possession a great while; for, in that case, the person having a right must bring an ejectment, and cannot enter by force.^(a) The reason why they were first introduced seems to be this: anciently most declarations in trespass were general only for breaking and entering the plaintiff's close in such a place, without giving any name to the close; but now, always in this court, by reason of the rule made Mich. 1654, (and most commonly in B. R.,) the plaintiffs, in their declaration, set forth the name of the close: but formerly, when the plaintiff declared only generally, it was a hardship on defendant to be obliged to answer such a general charge; for if the plaintiff had a large estate in the township, the defendant could not tell in which of the closes he would assign his trespass, and therefore they gave the defendant leave to plead the general issue, to oblige the plaintiff to make a new assignment, and ascertain the place in his replication: if he did not, and the defendant pleaded generally, as he might do, that the place in question was his freehold, the hardship would be turned on the plaintiff; for then, if the defendant could prove any one place in the township to be his freehold, the plaintiff would be gone, as is expressly held in the case of *Elwes v. Lombe*, 6 Modern, 117—119.

Lambert v. Stroother, Willes, R. 218, *per* Willes, C. J. (*a*) But see 6 Taunt. 207; and *Butcher v. Butcher*, 7 Barn. & C. 399.

That this was the reason of these pleas originally, appears from the words of the rule before mentioned, which says, that for the future the declaration may mention the place certainly, and so prevent the use and necessity of the common bar and new assignment.

As these were the reasons for admitting such a plea as this, I doubt very much whether this be a good plea in the present case, where the plaintiff has named the closes in his declaration. The reasons for this plea do not hold here: there is no hardship on the defendant, and the plaintiff has ascertained the place; nor can the plaintiff make a new assignment in his replication: if he did, it would be a departure in pleading. If, therefore, it were necessary in this case to give an opinion upon this point, I am inclined to be of opinion (as at present advised) that the plea is not good.^(b)

^(b) The point *decided* in the case of *Lambert v. Stroother*, from which these observations of Willes, C. J., are taken, was, that the plea of *liberum tenementum* may be traversed by the plaintiff in his replication, and that the plaintiff is not *compelled* to new assign, which was doubted in Cro. Ja. 594, (Mr. Serjeant Williams says unaccountably, 1 Saund. 299 c.) As to the question, whether it is a *good plea* where the plaintiff gives a *name to the place*, it has never been decided, nor the question raised since Willes's judgment; but it has been decided, that the plea is not useful *as the common bar* in such case, since the plaintiff is under no risk in not new assigning: for even if the defendant has a close of the same name in the parish, still the plaintiff's close is sufficiently ascertained by the name, and the trespasses will be applied to his close, and not to the defendant's. *Cocker v. Crompton*, 1 Barn. & Cres. 489.¶

But if an action of trespass be brought for taking and carrying away trees out of a close, the defendant cannot plead that the place in which the trespass is charged is his freehold; for this can only be pleaded to an action of trespass *quare clausum fregit*.

Carth. 176, *Alstone v. Hutchinson*. ¶But if the plea had stated that the trees were wrongfully in the defendant's close and encumbering it, wherefore defendant removed them, it would have been good.¶

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If to an action of trespass brought for breaking a close and eating grass with cattle, the defendant plead, that the cattle escaped out of an adjoining close in his possession, through a fence in the possession of the plaintiff, which the plaintiff ought to have kept in repair, and which was out of repair, it is necessary for the defendant to show why the plaintiff was bound to have kept the fence in repairs.(a)

Yelv. 75, Faldo v. Ridge. ||(a) But in a *declaration* for not repairing, it is clearly sufficient to state that defendant, *as occupier*, was bound to repair; and, on principle, this seems sufficient in a plea, since the defendant cannot be supposed to know the nature of the plaintiff's obligation. Vide 3 Term R. 768; 2 Chitty on Pleading, 585, *notâ.*||

If J S have recovered land in an action of ejectment against J N, and afterwards J N bring an action of trespass against J S for an injury done to the land, J S may plead the recovery in the action of ejectment, because the possession of J N was divested by the recovery in the action of ejectment.

3 Leon. 194, Anon.

If a recovery in a former action be pleaded to a second action for the same trespass, it is not necessary to show that a writ of execution was issued upon the judgment in the first action.

Bro. Tresp. pl. 20.

If an action of trespass be brought for taking a horse, and the defendant justify the taking of it damage-feasant in his close called A, it is sufficient to allege a possession of the close in himself: for, as the right of close cannot come in question, it is not necessary to show by what title he is possessed.

Cro. Car. 138; Salk. 643; 12 Mod. 37; ||2 Saund. R. 284 d, n. 3; but otherwise in an avowry, Ibid. and 2 Bos. & Pul. 359.||

But if the declaration, in an action of trespass *quare clausum fregit*, charge the breaking of a close called A, the defendant, if he justify the breaking, must show a title to the close; because, as a close certain is mentioned in the declaration, the question depends upon the right of close.

Salk. 643; 12 Mod. 509.

||And a defendant in trespass *quare clausum fregit* cannot plead, by way of justification, that he was possessed of a right of common over the *locus in quo* under a deed of grant by a former owner, alleged to be since lost and destroyed by accident and length of time, and therefore not proffered into court, of which the *date and names of the parties are unknown*. The court said this was going much beyond Read v. Brookman, 3 Term R. 151.

Hendy v. Stephenson, 10 East, 55.||

If the defendant in an action of trespass justify the taking of corn out of a close in the possession of the plaintiff, he must show a right to the corn; for it shall *primâ facie* be intended that it was the corn of the plaintiff.

2 Saund. 401, Pearl v. Bridges; 1 Ventr. 221.

If the plaintiff in an action of trespass *quare clausum fregit* have not given a name to his close, the defendant may justify the act complained of in his close called A, in the vill where the *venue* is laid, and there is no necessity to traverse the having done it in any other close in that vill.

Bro. Tresp. pl. 360, pl. 366.

But if the plaintiff in this action have given a name to his close, the defendant cannot justify the act complained of in any other close in the vill

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wherein the *venue* is laid, without traversing the having done it in the close of the plaintiff: but it is not necessary to traverse the having done it in any other vill; because, as the trespass is local, he cannot be found guilty in any other vill.

Bro. *Tresp.* pl. 360, pl. 366, pl. 369.

¶ Where the plaintiff gives a name to his close in the declaration *quare clausum fregit*, and the defendant pleads *liberum tenementum*, the plaintiff is not driven to new assign, but may take issue on the plea; and the issue will be for the plaintiff, unless the defendant show a title to the plaintiff's close, notwithstanding the defendant may have a close in the parish of the same name.

Cocker v. Crompton, 1 Barn. & C. 489; Willes R. 224; 2 Taunt. 156.¶

If an action of trespass be brought for a transitory trespass, and the *venue* be laid at A in the county of B, it is not necessary for the defendant, provided he justify the act complained of at A in the county of B, to traverse the having done it at any other place; the place being agreed.

Bro. *Tresp.* pl. 219; 3 Lev. 219.

[In trespass for taking and detaining the plaintiff's cattle at Teddington, the defendant justified taking them *damage-feasant* at Kingston, and that he drove them to Teddington, and impounded them there. It was objected on demurrer, that the justification was local, and therefore the defendant ought to have traversed the place in the declaration. *Sed non allocatur*;—for when the defendant says, he drove them to Teddington, and impounded them there, they agree in the place; for if defendant had not a right to take them, he was a trespasser at Teddington.

Riley v. Parkhurst, Tr. 22 G. 2, Bul. N. P. 90.] {See 2 Bos. & Pul. 480, Abercrombie v. Parkhurst.}

The defendant in an action of trespass, in case the matter of justification be transitory, must always justify at the place in which the *venue* is laid, although the matter of justification arise at another place: nor is there any inconveniency in so doing; for, as the matter of justification is transitory, he may avail himself thereof, notwithstanding it arise at another place.

1 Inst. 282; Cro. Ja. 372; 3 Lev. 113; 2 Saund. 5.

But if the *venue* in an action of trespass be laid at A in the county of C, and the matter of justification be, that the defendant did the act complained of at B in the county of C, as constable thereof, he can only justify at B in the county of C, because the matter of justification is local; and he must traverse the having done the act at any other place.

1 Inst. 282; Cro. Eliz. 705; Cro. Ja. 372; 3 Lev. 13.

So, if the *venue* in this action be laid at A in the county of B, and the matter of justification be, that the act complained of was done by the defendant in the county of C, as a justice of the peace of this county, the defendant, as the matter of justification is local, can only justify at some place in the county of C, and he must traverse the having done the act at A in the county of B, or at any other place out of the county of C.

1 Inst. 282; Bro. *Trav.* pl. 76, pl. 85, pl. 102; Cro. Ja. 372. ¶ The want of this traverse is a ground of special demurrer, and the averment of *quæ est eadem* does not supply the want of it as to *place*, although it does as to *time*. Vide Benjamin v. Howell, 1 Wils. R. 81. For this difference there seems no solid reason. As the insertion of the traverse, as well as the averment of *quæ est eadem*, will render the plea bad on special demurrer, it is better to omit the latter. Vide the perspicuous notes on this subject, 2 Saund. R. 5 a, b, c, d, e, (5th ed.)¶

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The defendant, who justifies in an action of trespass, ought, unless there be some special reason to the contrary, to justify upon the day on which the act complained of is alleged to have been done.

2 Saund. 5, Mellor v. Walker. ¶If the nature of the plea admits it, the defendant in justifying should follow the day in the declaration. If he is obliged to justify on another day, he must either traverse all other days and times, or aver that the trespass is the same, and the latter is the usual practice. If the defendant do both, the plea is informal and bad on special demurrer. Vide 2 Saund. R. 5 a, 5 b.¶

And if the defendant in this action justify the act complained of upon the day on which it is alleged to have been done, it is not necessary to traverse the time either before or after; the day being agreed.

Bro. Tresp. pl. 219; Cro. Car. 228; 2 Saund. 295; 1 Bulst. 138; 1 Freem. 246.

But if the defendant in this action justify the act complained of upon any other day than that on which it is alleged to have been done, it is necessary to traverse the time before, or the time after, or both, as the case may require.

Bro. Tresp. pl. 219; Cro. Car. 228; 1 Bulst. 138; Lutw. 452.

If the justification be, that the defendant had a license to do the act complained of, the time antecedent as well as that subsequent to the time of the license must be traversed.

Sid. 294; 2 Saund. 295.

But if the justification be under a release, it is sufficient to traverse the time subsequent to the release; for by the release all trespasses antecedent thereto are discharged.

Hob. 104; Cro. Eliz. 87.

If the defendant justify under a feoffment, it is only necessary to traverse the time antecedent to the feoffment; for it shall be intended, unless the contrary be shown, that the freehold continued in him.

Hob. 104; Carth. 207.

It is laid down in one case, that the want of traversing the time, either before or after the day upon which the act complained of is justified, is not cured by an averment that it is the same trespass.

1 Ventr. 184, Smith v. Butterfield; Hil. 23 Car. 2; 2 Keb. 878, S. C.; ¶2 Saund. R. 5 a, 5 b, acc.¶

But in divers other cases, some of which are subsequent to the case of Smith v. Butterfield, it is laid down, that the want of doing this is cured by an averment that it is the same trespass.

1 Bulstr. 138; Cro. Car. 228; 2 Jon. 146; 3 Lev. 277; Lutw. 1457.

And it is in one of the subsequent cases laid down, that if the defendant in an action of trespass, who justifies the act complained of, after averring that it is the same trespass, add a traverse of the time, either before or after the day justified upon, the plea is bad upon a special demurrer.

Lutw. 1457, Hargrave v. Ward, Hil. 9 W. 3; ¶2 Saund. 5 a, 5 b, acc.¶

3. Both the General Issue and a Special Plea.

The manner of pleading a single plea in an action of trespass, where the defendant intends to justify the whole act complained of, except the force and arms, is to plead not guilty as to the force and arms,(a) and to justify as to the residue.

Co. Entr. 644, 647; Rast. Entr. 605, 606. ¶(a) The denial of force and arms, &c., is merely for the purpose of saving the fine to the king; and if the general issue extend

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to no other part of the declaration, and the affirmative of the other issues lies on the defendant, he is entitled at the trial to open the case, and have the general reply. *Jackson v. Hesketh*, 2 Stark. Ca. 518; *Hodges v. Holder*, 3 Camp. 366.¶

It has indeed been holden in one case, that if the defendant in an action of trespass justify all the residue of the trespass charged, it is not necessary to give an answer as to the force and arms.

1 Saund. 81, *Law v. King*. ¶Whatever doubt might formerly exist, it is clear these are now only words of *form*, and the omission of them is only matter of *special* demurrer, by 4 Ann. c. 16. See *antè* p. 501.¶

The determination in this case was probably founded upon a supposition that the words *vi et armis* are words of form.

But the better opinion is, as has been already observed, that these words are words of substance. And if they are words of substance it seems necessary to give an answer as to them.

¶*Antè*, p. 501, *contra*.¶

If two defendants in an action of trespass have different matters of justification as to the whole act complained of, it is proper for both to join in pleading not guilty as to the force and arms; and then for each to plead separately his matter of justification.

Rast. Entr. 612.

If two independent acts are complained of in an action of trespass, the defendant may justify as to one act, and plead not guilty as to the force and arms of the other.

Co. Entr. 651; Rast. Entr. 606.

But if the complaint be of battery and false imprisonment, it has been holden, that these are not two such independent acts as to admit of the defendant's pleading not guilty as to the force and arms and the battery, and a justification as to the imprisonment; because in every false imprisonment there is an implied battery.

Cro. Ja. 439, *Evely v. Sloley*; Ld. Raym. 231, 232. ¶Vide 1 Saund. R. 296, and tit. *Assault*, &c.¶

If, however, it in such case appear from the declaration, that the battery is an independent act, the defendant may plead not guilty as to this and the force and arms, and justify as to the imprisonment.

Ld. Raym. 231, *Truscot v. Carpenter*.

If the complaint in an action of trespass consist of four entirely independent acts, the defendant may plead not guilty as to the force and arms and one of the acts, and justify generally as to the other three acts by the words as to the residue of the trespass, without enumerating them.

3 Lev. 404, *Patrick v. Johnson*.

And this is the safer way of pleading: for if the defendant, instead of relying upon the words as to the residue of the trespass, endeavour to enumerate the other three acts, and omit one of them, or any circumstance attending it, the plea is bad.

Ld. Raym. 231, *Truscot v. Carpenter*; 3 Lev. 404.

If the complaint in an action of trespass, to which two are defendants, consist of several independent acts, one defendant may plead not guilty as to the force and arms, and all the residue of the trespass, except the act as to which he justifies; and the other may plead not guilty as to the force and arms, and all the residue of the trespass, except the act as to which he justifies.

Co. Entr. 651.

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The defendant in an action of trespass could not heretofore plead two pleas, each of which went to the whole of the trespass alleged.

Bro. Bar. pl. 51.

By the 4 Ann. c. 16, it is enacted, "That it shall be lawful for any defendant in any action in any court of record, with leave of the court, to plead as many several matters as he shall think necessary for his defence."

||Formerly when the pleas were contradictory,—as not guilty and a license,—the defendant was obliged to make it appear by affidavit that it was necessary to plead both; but it is not so now. See Tidd's Prac. 657, (9th ed.)||

4. Of giving Colour.

Colour is a feigned matter pleaded by the defendant in an action of trespass, from which the plaintiff seems to have a good cause of action, whereas he has in truth only an appearance or colour of cause.

The showing of such matter by the defendant is called giving colour. As the design of giving colour is to draw the determination of some matter from the jury to the court, it is necessary that the colour given should consist of a matter which is not proper for the determination of a jury.

10 Rep. 91, Leyfield's case; Doctr. Pl. 77; 10 Rep. 89, 90, Leyfield's case.

If the defendant, in an action of trespass *quare clausum fregit*, plead, that the plaintiff claims the close in which the act complained of is charged to have been done, under colour of a deed of feoffment by which nothing passed, this is good colour; because nothing passes by a deed of feoffment unless possession be delivered, and the jury are not proper judges of what amounts to delivery of possession.

Cro. Ja. 122; 10 Rep. 89, 90.

But if the defendant in an action of trespass for taking goods plead, that the plaintiff claims the goods under colour of a deed of gift by which nothing passed, this is not good colour; because, as the property in goods vests by a deed of gift without further ceremony, the defendant, by admitting the deed of gift, admits the property in the goods to be in the plaintiff. In which case, as there remains only a question of fact to be tried, namely, whether there was a deed of gift, the matter is proper for the determination of the jury.

Cro. Ja. 122, Radford v. Harbyn; 10 Rep. 89.

If the matter pleaded in an action of trespass entirely take away the plaintiff's right of action, it is not necessary for the defendant to give colour; because the question in such case can only be, whether the matter pleaded did in fact exist, which is proper for the determination of the jury.

10 Rep. 90, Leyfield's case; Doctr. Pl. 77. ||The practice of giving colour is not now of very frequent occurrence: it is, however, necessary in all cases in trespass *quare clausum fregit*, where the defendant claims only a possessory title, (as a term for years,) derived from a *stranger*, and desires to bring his title before the court on the record, instead of giving it in evidence, as he might do on the general issue; for in such cases the plea setting up a possessory right in the defendant takes away all colour of action from the plaintiff, and therefore, to prevent it amounting to the general issue, the defendant must give an express colour by surmise in his plea. It also may be sometimes necessary where a person having a possessory title is obliged to justify a damage to *personal property*, as cutting posts, &c., which, according to 8 East, R. 404, cannot be justified under the general issue. Vide the subject of colour explained in Mr. Stephens' work on Pleading, p. 220, *et seq.*; and Chitty on Pleading, vol. i. 502.

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The omission of giving colour when requisite, is aided by the replication, *Ashmead v. Ranger*, *Ld. Raym.* 551; and it is aided after verdict by 32 H. 8, c. 30; 1 Saund. 228 b; and it can only be taken advantage of by special demurrer since the 4 Ann. c. 16. See 10 Coke, R. 92 a, note B. (ed. 1826.) Giving colour where it is not necessary does not vitiate the pleading. *Taylor v. Eastwood*, 1 East, 219.¶

If the defendant in an action of trespass *quare clausum fregit*, after deriving title to himself under divers conveyances, plead, that the plaintiff claims under colour of a deed from the last conveyor by which nothing passed, this is not good colour; for he ought to have given colour under the person who first conveyed.

2 Roll. R. 140, *Allen's case*.

If the defendant in an action of trespass *quare clausum fregit* plead, that the plaintiff claims under colour of a feoffment by which nothing passed, this is not good colour; because a feoffment implies a delivery of the possession. But if he plead that the plaintiff claims under colour of a deed of feoffment by which nothing passed, this is good colour; because there may not have been a delivery of possession, and nothing does pass under a deed of feoffment, unless possession be delivered.

2 Roll. R. 140, *Allen's case*.

If the defendant justify the seizing of goods, for the taking of which an action of trespass is brought, as a wreck, it is not necessary for him to give colour; it not being material whose the goods were before.

10 Rep. 90, *Leyfield's case*.

If an action of trespass be brought for the taking of corn set out for tithe, it is not necessary for the defendant to give colour; it being not material whose the corn was before it was set out for tithe.

10 Rep. 91, *Leyfield's case*.

It has been holden, that if the defendant in an action of trespass have omitted to give colour, the plaintiff can only take advantage of the omission by a special demurrer; the giving of colour being a matter of form.

3 Leon. 267, *Taylor v. Fisher*.

¶The rule as to giving colour appears to be confined to pleas, and not to extend to replications and other pleadings. Therefore, in trespass for taking and driving the plaintiff's cattle, where the defendant justifies that he was lawfully possessed of a close, and that he took the cattle damage-feasant, the plaintiff may reply title specially in another, and that he entered by his command, though he might have given this in evidence on the replication *de injuria*, &c., and in such a replication (which certainly gives no implied colour to the defendant) it was held not necessary to give express colour, but the giving colour, if given, being mere form, does not vitiate the replication.

Taylor v. Eastwood, 1 East, R. 212; and see *Stephens on Pleading*, 230.¶

4. Of the Replication.

1. In the General.

If the defendant in an action of trespass plead any matter in excuse or justification, the plaintiff must not only reply *de injuriâ suâ propriâ*, but he must also traverse the matter specially pleaded, otherwise no issue can be joined; inasmuch as the words *de injuriâ suâ propriâ* do not amount to an express negative of the matter specially pleaded.

¶In trespass for an assault and battery, the replication *de injuriâ*, to a

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plea the plaintiff was the defendant's apprentice, whom he moderately chastised for improper conduct, does not put in issue the question of the moderation and chastisement.

Penn v. Ward, 2 C. M. & R. 338; 4 Dowl. P. C. 215; 1 Gale, 189. See as to the replication *de injuriâ*, Reece v. Taylor, 4 Nev. & M. 470; 1 Harr. & Wall. 15; Hooker v. Nye, 1 C. M. & R. 258; 4 Tyr. 477; Vivian v. Jenkins, 3 Nev. & M. 14; 1 Har. & Woll. 468; Gisbourne v. Wyatt, 1 Gale, 35; Carnaby v. Welby, 1 Perr. & Add. 98; Jelley v. Bradley, 1 Carr. & M. 270.†

In some cases it is sufficient for the plaintiff in an action of trespass to traverse the matter specially pleaded by the general traverse, which is *absque tali causâ*; in others, the matter specially pleaded must be traversed specially.

If the defendant in an action of trespass plead matter in excuse, the general traverse is sufficient; because, as no right of doing the act complained of is insisted upon, it is sufficient for the plaintiff to deny that the defendant had such excuse.

8 Rep. 67, Crogate's case; Doctr. Pl. 115; Finch. 395; 12 Mod. 581; {Willes, 52, Cooper v. Monke; 1 Bos. & Pul. 76, Jones v. Kitchin; 4 Johns. Rep. 150, Hyatt v. Wood; 5 Johns. Rep. 112, Lytle v. Lee & Ruggles.} ||See 2 Will. Saund. 295, note (1.); 1 Will. Saund. 244 c, note (7).||

If the defendant in an action of trespass plead *son assault demesne*, the general traverse is sufficient; because the matter pleaded amounts only to an excuse.

8 Rep. 67, Crogate's case; Doctr. Pl. 115. β Upon an issue of *son assault demesne*, it is necessary to prove an assault commensurate with the trespass sought to be justified. Reece v. Taylor, 4 Nev. & M. 470; 1 Har. & Woll. 15.†

If the defendant in an action of trespass plead matter of record in justification, this, provided it be material, must be specially traversed; (a) it not being proper that a question arising upon matter of record should be determined by the jury.

Bro. *De son tort*, pl. 18, pl. 20, pl. 50, pl. 53; 8 Rep. 67; 12 Mod. 581. ||(a) Or the plaintiff may admit or protest the matter of record, and traverse *de injuriâ suâ propriâ absque residuo causæ*.||

And for the same reason, if the matter pleaded by the defendant in this action in justification consist as to part of matter of record, there must be a special traverse, notwithstanding it consist as to other part of matter *in pais*.

8 Rep. 67, Crogate's case. ||See last note.||

But, if the defendant in this action allege matter of record, merely by way of inducement to another matter specially pleaded, it is not necessary to traverse the matter of record specially.

2 Leon. 102, Parker v. Budon; 12 Mod. 581, 583.

If the defendant in an action of trespass justify under the process of a court of admiralty, or of any other court which is not a court of record, the general traverse is sufficient.

8 Rep. 67, Crogate's case.

If the defendant in an action of trespass justify under a right given by the common law to all persons, the general traverse is sufficient.

Salk. 628; 12 Mod. 582, 583; Finch. Law, 395; Co. Entr. 643.

But if the defendant in this action justify under a right of common, or a right of way, the general traverse is not sufficient; for, as the defendant in

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such case insists upon a right peculiar to himself, this must be traversed specially.

Finch. Law, 396; 8 Rep. 67; 3 Lev. 107; 12 Mod. 582; {Willes, 52, 99; 1 Bos. & Pul. 76; 4 Johns. Rep. 150. But it is sufficient after verdict. Hob. 76, Banks v. Parker; T. Ray. 50, Collins v. Walker; 5 Johns. Rep. 112, Lytle v. Lee & Ruggles.} [See 7 Price, 670; 2 Will. Saund. 295 a.]

If the defendant in an action of trespass justify the arresting of a man for a breach of the peace, as being a constable, the general traverse is sufficient; because the justification is under an authority given by the common law to all constables.

12 Mod. 582, Chancey v. Wynn; Finch. Law, 395.

But if the defendant in this action justify the arresting of a man under a writ or warrant to him directed, the general traverse is not sufficient; but the authority, it being to the defendant in particular, must be specially traversed. (a)

Bro. *De son tort*, pl. 14, pl. 53; Finch. Law, 395; 12 Mod. 582. [(a) Or the writ may be admitted or protested, and the replication be *de injuriâ suâ propriâ absque residuo causæ*.]

If the defendant in an action of trespass justify under a right given by a public statute to all persons, the general traverse is sufficient.

Co. Entr. 643; Salk. 628; 12 Mod. 582.

If the defendant in an action of trespass justify under a license from the plaintiff, the general traverse is not sufficient: but the license, it being to the defendant in particular, must be specially traversed.

Finch. Law, 396; 8 Rep. 67; [2 Saund. 295 a.]

The general rule of law is, that a traverse ought not to be multifarious, but to be confined to one material point.

But this rule does not extend to the general traverse in an action of trespass.

[See 1 Bos. & Pul. 80.]

For if the matter pleaded by the defendant in this action in justification consist of divers parts, each of which would, if it had stood single, have been traversable by the general traverse, all these may be traversed by the general traverse; because all may be put in issue thereby.

8 Rep. 67, Crogate's case; 2 Leon. 81; Cro. Ja. 599; Salk. 4.

[A replication, *de injuriâ*, &c., where improper, is cured by verdict, but has been holden bad on general demurrer. It may, however, be doubted, whether the demurrer must not be special since the 4 Ann. c. 16; and it is usually special.

Hob. 76; Sir T. Ray. 50; 3 Lev. 65.]

If the plaintiff in an action of trespass traverse the matter pleaded by the defendant by a special traverse, the traverse must conclude with an averment.

Salk. 4, Haywood v. Davies; Co. Entr. 649.

But if the plaintiff in this action traverse the matter pleaded by the defendant by the general traverse, the conclusion must be to the country.

Salk. 4, Haywood v. Davies; Co. Entr. 651.

If the plaintiff in an action of trespass declare upon a possession, and the defendant justify under a title, it is sufficient for the plaintiff to traverse the title set out by the defendant, without showing a title in himself; for, if the defendant have no title, the plaintiff ought to recover upon his possession.

Stra. 1238, Cary v. Holt; Cro. Eliz. 288; Poph. 1.

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But, if the defendant in this action justify under a title, and it appear from the record that he was in possession before the plaintiff came into possession, the plaintiff must show a title in himself, as well as traverse that set out by the defendant; otherwise, although a verdict should be found for the plaintiff, there is no ground for the court to give judgment for him.

Poph. 1, 2, *Fehner v. Ficher*.

If the defendant in an action of trespass plead a seisin in J S under whom he claims, the plaintiff cannot reply a seisin in J N under whom he claims, without traversing the seisin alleged by the defendant; because the two titles are inconsistent.

Cro. Eliz. 30; *Herring v. Blacklow*, 1 Leon, 78; Lutw. 1343.

But if a title, which is different from that set out by the defendant in this action, but not inconsistent therewith, be insisted upon by the plaintiff, it is not necessary for him to traverse the defendant's title.

If a lease for years, the date of which is antecedent to the commencement of the defendant's title, be replied by the plaintiff in an action of trespass *quare clausum fregit* to a plea of freehold, it is not necessary to traverse that the close in which the trespass is charged is the freehold of the defendant; because the two titles are not inconsistent.

Dyer, 171; Sir W. Jones, 352; Cro. Car. 384.

But if such lease be replied by the plaintiff in this action to a plea of feoffment, the title of the defendant must be traversed; because the two titles are inconsistent.

Sir W. Jones, 352; *Key v. Koke*, Dyer, 171.

[If in trespass for taking a gelding, (or other chattel,) the defendant plead that the place where is 100 acres, and that J S is seised thereof in fee, and that he, as his servant, and by his express orders, took the gelding (or other chattel) damage-feasant, the plaintiff cannot reply *de injuriâ suâ propriâ absque tali causâ*, for that would put in issue three or four things; but he must traverse one thing in particular.(a)]

Cockerel v. Armstrong, E. 11 G. 2, C. B., Bull. N. P. 93;] {Willes, 99, S. C.; Ibid. 202, *Bell v. Wardell*, S. P.} ||(a) The judgment in this case is right, but the reason is wrong. The replication was bad, not because it put in issue several things, for that happens in every case where the defence arises out of several facts all operating to one point of excuse, but because it put in issue an *interest in land*, and a *command* which ought to be specially traversed. See judgment of Eyre, C. J., 1 Bos. & Pul. 80.||

It seems to have been doubted formerly, whether there must not always be a new assignment, where the plaintiff in an action of trespass *quare clausum fregit* has not given a name to his close, and the defendant has pleaded, that the close in which the trespass is charged is his freehold.

Cro. Ja. 594, *Richman v. Cox*, Trin. 18 Jac. 1.

But it has been since holden, that the plaintiff in this action has in such case an election either to make a new assignment, or to reply that the close in which the trespass is charged is his freehold, with a traverse of its being the freehold of the defendant.

Lutw. 1399, *Hustler v. Raines*, Trin. 5 W. 3. {See 2 Cain. 233, *Hallock v. Robinson*.} ||*Lambert v. Strother*, Willes, 218.||

But if the plaintiff in such case reply, that the close in which the trespass is charged is his freehold, he must conclude to the country; for, although

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the matter pleaded by the defendant be not expressly denied by the replication, yet it contains matter so sufficiently negative of the matter pleaded by the defendant, that an issue may be taken upon it.

Lutw. 1399; *Hustler v. Raines*, 1 Inst. 126. ¶The replication now always contains an express traverse of the defendant's allegation of *liberum tenementum*, which is the gist of the replication, and the averment of the close being the plaintiff's soil and freehold is immaterial.¶

If the defendant in an action of trespass justify under the process of an inferior court, the plaintiff cannot reply, that the cause of action did not arise within the jurisdiction of the court; for as the jurisdiction was not pleaded to, he shall not be received to say, that the cause of action did not arise therein.

Ld. Raym. 233, *Truscot v. Carpenter*; ¶*sed vide antè*, p. 465.¶

If the defendant in this action justify an arrest under a sufficient warrant, the plaintiff cannot reply that the arrest was not made under such warrant; but he ought to traverse the defendant's having had such warrant at the time of the arrest; for although the defendant did declare at the time of the arrest, that he arrested the plaintiff under an insufficient warrant, yet if he had at that time a sufficient warrant, he may, in case an action be brought against him for the arrest, justify under the latter.

Ld. Raym. 465, 466, *Greenvelt v. Burwell*; ¶12 Mod. 386; *Crowther v. Ramsbottom*, 7 Term R. 654.¶

If the defendant in an action of trespass justify the taking of corn, as having been sent out for the tithe of corn which grew in a close called A, in the parish of B, the plaintiff cannot in his replication traverse the growing of the corn in this close; for, if it grew anywhere within the parish of B, the person entitled to the tithe of corn in that parish had a right to take it: but the plaintiff may traverse the growing of the corn in the parish of B.

Bro. Repl. pl. 54; Bro. Trav. pl. 267.

If the defendant in an action of trespass *quare clausum fregit* plead, that being the servant of J S, he by the command of J S put a beast, the property of J S, who had a right of common there, into the close in which the trespass is charged, the plaintiff may reply, that he put in a beast of his own, without traversing the having put in the beast of J S, for the defendant may have put in a beast of his own as well as one of J S. But the defendant may in his rejoinder traverse the having put in a beast of his own.

Bro. Trav. pl. 385. ¶This replication is in nature of a new assignment.¶

If the defendant in an action of trespass plead, that his beast went into the plaintiff's close through a fence belonging to the plaintiff, which was out of repair, the plaintiff may reply, that it went through another fence, without saying what fence or traversing its having gone through his fence; for, if the beast did not go through the plaintiff's fence, it is quite immaterial what fence it did go through.

Sty. 357, *Baker v. Andrews*. ¶Or the plaintiff may in such case reply *de injuriâ*, &c., generally, which will put in issue all the matters in the plea. Willes, R. 54.¶

If the defendant in an action of trespass, who had a license in law to do the act complained of, justify under the command of another, the plaintiff cannot traverse the command in his replication; because the pleading thereof was not necessary.

3 Lev. 113, *Bridgwater v. Betheway*.

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It has been holden, that if the defendant in an action of trespass *quare clausum fregit* justify the entering into the close in which the trespass is charged by the command of J S, in whom the freehold is alleged to be, the plaintiff is not obliged to traverse in his replication, that the close is the freehold of J S, or to show a title in himself; it being sufficient to traverse the command.

Bro. *De son tort*, pl. 13.

But it is laid down in other books, that it is in such case necessary for the plaintiff to traverse in his replication that the close is the freehold of J S, for that the command is not traversable.

Salk. 107; 6 Rep. 24; Doctr. Pl. 352.

And it is in one of these books laid down, that a traverse of the command in such case would be an admission that the close is the freehold of J S, and consequently it would take away the plaintiff's right of action; because the injury would then have been done to J S and not to the plaintiff.

Salk. 107, *Trevillian v. Pine*.

If the defendant in an action of trespass *quare clausum fregit* justify the distraining of a beast damage-feasant by the command of J S, in whom a right of distraining is alleged to be, the plaintiff may traverse the command in his replication; for, although it be thereby admitted that J S had a right to distrain, the defendant, unless he had the command of J S to distrain, has done an injury to the plaintiff.

Salk. 107, *Trevillian v. Pine*; 6 Rep. 24; 2 Leon. 196, 215; Ld. Raym. 309. ||It is now settled, that in trespass *quare clausum fregit*, as well as trespass for taking goods, where the defendant justifies under the command of another, such command is traversable; for as trespass is maintainable against a wrong-doer by a person in possession, even without title, the plaintiff must be permitted to show that the defendant is a wrong-doer, which he will be, unless he have the authority of the person entitled. *Chambers v. Donaldson*, 11 East R. 65; 1 Saund. R. 347 c, (5th ed.)||

It is laid down, that if the defendant in an action of trespass justify as bailiff of J S, it is not necessary for the plaintiff to traverse his having acted as bailiff of J S.

Cro. Eliz. 14, *The Earl of Bedford's case*; 1 Roll. Rep. 46.

But it is in other books laid down, that the having acted as bailiff of J S must in such case be traversed.

1 Leon. 50; 2 Leon. 196, 216; 3 Lev. 20.

If the defendant in an action of trespass justify the distraining of a beast damage-feasant as bailiff of J S, the plaintiff cannot reply, that the defendant distrained the beast without the command of J S; because, as every bailiff has a general authority to distrain, the command of J S was not necessary to enable the defendant to distrain.

Dobson v. Douglas, Salk. 107.

β To a plea of *liberum tenementum*, the plaintiff may reply by traversing the title.

Crockett v. Lashbrook, 5 Monroe, 534.γ

2. Of making a new Assignment.

A new assignment in an action of trespass is an ascertainment by the plaintiff, in his replication, of the place where, or the time when, the trespass charged in his declaration was committed.

||See 1 Kenyon, R. 289.||

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If the plaintiff, in his declaration in an action of trespass *quare clausum fregit*, charge a trespass in a close in the parish of B, and the defendant justify doing the act complained of in a close in the parish of B named in his plea, which is his freehold, the plaintiff may in his replication make a new assignment.

Salk. 453, *Helvis v. Lamb*; 6 Mod. 119.

And it is necessary for the plaintiff so to do; otherwise, if it be proved at the trial, that there is a close in the parish of B which is the freehold of the defendant, there must be a verdict for him; because the plaintiff has not ascertained his close by name.

Salk. 453, *Helvis v. Lamb*; 6 Mod. 119. ¶But when plaintiff names his close in the declaration, a new assignment is not necessary. 1 Barn. & C. 489; and see 2 Barn. & C. 918.¶

But if, in an action of trespass *quare clausum fregit*, a trespass be charged in a close in the parish of B belonging to the plaintiff, and the defendant justify the doing of the act complained of in a close containing six acres in the parish of B, which is his freehold; and the plaintiff reply, that the close in which the trespass is charged containing six acres in the parish of B is his freehold; and it appear in evidence, that the plaintiff has a close containing six acres in the parish of B, and the defendant another close containing six acres in that parish, there must be a verdict for the plaintiff; because, as the defendant has not given a name to his close, it was not necessary for the plaintiff to ascertain his close by name, inasmuch as the plea of the defendant shall be intended to relate to the close of the plaintiff.

Dyer, 23, Anon.

¶If the plaintiff have an exclusive right to a part of close A B, but not to the whole, he may declare generally for trespasses committed in his close A B, and if the defendant wishes to drive him to new assign, confining the trespasses to that part of the close which is plaintiff's, the defendant must plead *liberum tenementum*.

Stevens v. Whistler, 11 East, 51.¶

It has been doubted, whether the plaintiff can make a new assignment as to the place in an action of trespass, except it be an action of trespass *quare clausum fregit*.

1 Freem. 238; Carth. 176.

But it seems to be the better opinion, that the making of a new assignment is not confined to this action.

Cro. Ja. 141; Salk. 453; 1 Freem. 238, 246; 6 Mod. 120; ¶1 Saund. R. 300 c. It is now so settled.¶

It is indeed true, that the plaintiff cannot make a new assignment as to the place in an action of trespass, which is brought for a transitory trespass.

But it is likewise true, that it is never necessary to make a new assignment as to the place where the trespass is transitory; because the place is never material in such trespass.

Carth. 176, *Alstone v. Hutchinson*.

But if an action of trespass be brought for taking goods, and the defendant justify the taking of them damage-feasant in a place named in his plea, the plaintiff may by a new assignment charge that they were taken in a place different from that in which the defendant has justified; for the tres-

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pass, which is in its nature transitory, is by this plea made local, and consequently the place becomes material.

Cro. Ja. 141, *Batt v. Beadley*; Salk. 453; Ld. Raym. 121; ||1 Saund. R. 300 c.||

As only damages can be recovered in an action of trespass, a new assignment as to the place is good, notwithstanding the trespass is charged to have been committed upon a larger quantity of land than is mentioned in the declaration.

Winch, 65, *Avis v. Gennie*.

If by the defendant's plea in an action of trespass the time be made material, the plaintiff may make a new assignment as to this.

||See 2 Camp. 175.||

If the defendant in an action of trespass plead *son assault demesne* at one hour of the day, upon which an assault and battery are charged, the plaintiff may by a new assignment charge another assault and battery at another hour of the same day.

6 Mod. 121, *Elwis v. Lombe*.

And if the plaintiff do not in this case make a new assignment, there must be a verdict for the defendant, provided he prove that the plaintiff did make an assault upon him at any time of the day mentioned in the declaration, although the defendant did make an assault upon the plaintiff at another time of the same day.

6 Mod. 121, *Elwis v. Lombe*.

||It is a rule, that where the defendant has committed several trespasses either on the person, land, or goods of the plaintiff, some of which are justifiable, and others not, and the action is brought for those trespasses which are *not* justifiable, but the defendant, by his plea, answers only those which *are*, the plaintiff by his replication should make a *new assignment*. The plaintiff cannot new assign, unless there have been two assaults, &c., committed upon him; for the new assignment is an acknowledgment by the plaintiff, that the defendant has justified *one* assault, &c.

1 Saund. R. 299 a, (5th ed.)

And a new assignment is not necessary, except where there is but one count in the declaration.

2 Taunt. R. 172.

In actions for breaking and entering the plaintiff's house or land, and felling timber, or carrying away goods, if the defendant plead a license, which the plaintiff had revoked before the trespasses were committed, or which is confined to some particular thing, and the defendant have exceeded it, the plaintiff must not take issue on the plea, but must state the revocation or excess in a new assignment.

1 Saund. R. 300 d; *Ditcham v. Bond*, 3 Camp. 524; *Lambert v. Hodgson*, 1 Bing. 317; *Monprivatt v. Smith*, 2 Camp. 175.

But where the declaration complains of trespasses on several days and times, and the defendant pleads a license generally, he is bound to show a license co-extensive with the trespasses alleged; and therefore if the plaintiff reply *de injuriâ*, &c., putting in issue the whole plea, and prove any one trespass committed, to which the license does not apply, he is entitled to a verdict; and it is not necessary for him to new assign.

Barnes v. Hunt, 11 East, R. 451.

Where one single act of trespass is stated in the declaration, *without*

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“*divers days and times*,” and the defendant’s justification covers that act, the plaintiff cannot reply, traversing the justification, and also new assigning; for this would be double.

Taylor v. Smith, 7 Taunt. 156.

And the rule is the same where the declaration contains several counts, *each alleging a single act* of trespass, and the defendant pleads a separate plea of justification to each count: here, if the plaintiff’s replication take issue on the justification, and also new assign, the replication is double; for it extends the cause of complaint beyond what is contained in the count.

Cheasley v. Barnes, 10 East, R. 73; Franks v. Morris, Ibid. 81; and see further, as to new assignment, the learned notes, 1 Saund. R. 299, 300 a, b, c, d, (5th ed.); 1 Term R. 479; 11 East, 51; 16 East, 82; 15 East, 235.¶

If the plaintiff in an action of trespass make a new assignment, either as to the time or place, he must conclude with an averment.

Lutw. 1401, Hustler v. Raines.

The certainty which is required in the declaration in an action of trespass has been already shown.

Ante, (I 1.)

It is sufficient to say in this place, that as the replication in this action is, so far as it contains a new assignment, a new declaration, the same certainty is required, as to that part of the replication which contains a new assignment, as is required in the declaration.

Dyer, 264, Anon.

As the replication in an action of trespass is, so far as it contains a new assignment, a new declaration, the defendant may in his rejoinder plead new matter in justification: [and, if necessary, he may plead double.]

Moor. 540, Odiham v. Smith; Bro. Tresp. pl. 3, pl. 168.

But the defendant can only plead new matter in his rejoinder, as to so much of the replication as contains a new assignment; for if any part of his plea be traversed in the replication, the defendant cannot as to this plead new matter, but must stand by what he had before pleaded.

Cro. Eliz. 812, Prettyman v. Lawrence.

The defendant in an action of trespass cannot in his rejoinder aver, that the place or time, newly assigned in the replication, is the same that is mentioned in the plea; for he shall not be received to say that either of these is the same, when the plaintiff has, by making a new assignment, averred that it is different.(a)

Bro. Tresp. pl. 3, pl. 168; Cro. Eliz. 355, 493. ¶(a)The issue on not guilty to the new assignment includes the question of identity; for the plaintiff on this issue must show that the place or time in the new assignment is different from that in the justification.¶

Nor is it necessary for the defendant to do this; the plaintiff being estopped, by having made a new assignment, from giving evidence of the commission of a trespass in the place, or at the time, mentioned in the plea.

Bro. Tresp. pl. 3, pl. 168; Cro. Eliz. 355, 493.

¶And therefore if the plaintiff’s case is, that the matter of the special plea is not true, he must traverse it by his replication, and not new assign; for he cannot dispute the truth of the justification on the issue on the new assignment.

(I) Of the Pleadings in Trespass. (*New Assignment.*)

Thus, where the defendant justified a trespass on the ground that the *locus in quo* was part of a common field allotted to him by the leet jury of a manor, and the plaintiff new assigned, setting out abuttals, and stating that the closes new assigned were different from the defendant's allotment; on not guilty to the new assignment, the plaintiff was held precluded from giving any evidence of trespasses in the defendant's allotment; and, the closes in the new assignment not being in fact different from the allotment, the defendant was held entitled to the verdict on the issue on the new assignment.

Pratt v. Groome, 13 East, 235.

So, where the defendant justifies the imprisonment of plaintiff under a writ issued against him by defendant as attorney for J M, endorsed for bail, and delivered to the sheriff, who, by virtue thereof, arrested and detained plaintiff; if the plaintiff means to insist that the arrest was irregularly made, without a sufficient warrant from the sheriff to the officer, he must traverse the plea; for if he new assign that the trespass complained of was upon another and different occasion than that stated in the plea, and after the supposed arrest therein mentioned, the defendant will be entitled to a verdict, the new assignment being contrary to the fact.

Oakley v. Davis, 16 East, R. 82.

So where the defendant justified breaking and entering the *locus in quo*, and throwing down the fences, on the ground of a right of common on the *locus*, and that the fences were improperly erected, and the plaintiff new assigned that the defendant entered for *other purposes* than the enjoyment of his right of common, and the jury found for the plaintiff on the new assignment; and it appeared that the defendant had thrown down the *whole* of the fences erected, when he might have enjoyed his right of common without throwing down any part of them: it was held, that as the defendant, a commoner, had a *right* to destroy the fences so improperly erected, though not compelled to do so in order to enjoy the common, the verdict on the new assignment could not be supported.

Arlett v. Ellis, 7 Barn. & C. 346.||

[In order to avoid a new assignment, it is the practice to insert two counts in the declaration. The first charges an injury done to the land, and taking the goods there; that is in its nature local, and must be proved where laid. Then the reason, and almost the only one, for adding the second count, is to avoid the locality: (a) it is for taking goods *generally*. That is of a transitory kind, and may be supported, though the taking be proved to be elsewhere. There cannot be a new assignment, but where there is a special plea. And if the case be such that on a special plea the plaintiff may be driven to a new assignment, he may give the matter in evidence under the second count on not guilty.

Bull. N. P. 17; 1 Term R. 479.] ||(a) If the plaintiff recovers on the *asportavit* count, he is entitled to full costs with *any* damages; but in order to recover, there must be a substantive independent injury to personal property. 1 Stark. Ca. 55; 7 Moo. 269; Tidd's Prac. 964, (9th ed.)||

||If the plaintiff's new assignment be uncertain, the defendant must take objection to it by demurrer. Where the new assignment stated the *locus in quo* to abut on closes, B, M, and S, some or one of them, and the defendant pleaded to the new assignment instead of demurring, it was held

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that the plaintiff proved the issue by showing that he had a close abutting on M.

Lethbridge v. Winter, 2 Bingh. 49.]

¶ In trespass to real property, if the declaration does not state the name or abuttals of the close, &c., with such precision as to avoid the possibility of the defendant having a close, &c., in the same county of a similar description, and the defendant has pleaded *liberum tenementum*, without describing the close, the plaintiff should new assign and not take issue on the plea; for if he were to do so, he would fail upon trial, if the defendant could show that any close in the county, or the place stated in the declaration, was his freehold. If the issue be joined in the plea of *liberum tenementum*, the defendant may elect to which parcel he will apply his plea, and the plaintiff cannot insist on a trespass in other parcels without a new assignment. This rule applies as well where there are more general counts than one, as to one count only where *liberum tenementum* is pleaded to each; and in such case the plaintiff will not be entitled to recover unless he prove more than one close and trespass, provided the defendant show that he is entitled to land in the same in which the declaration charges the trespass to have been made. This would be the consequence of an issue taken on such plea to a new assignment when the place is not ascertained in it with exactness. The defendant must plead to a new assignment in the same manner as to a declaration; and if the plea be such as would require a new assignment, if pleaded to a declaration, the plaintiff must again new assign.

Tribble v. Frame, 7 Monr. 530.g

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¶ See Phillipps on Evid., vol. ii., ch. 14, (7th. ed.)¶

If the time be not material in an action of trespass, evidence may be given of a trespass committed at any time before the bringing of the action, although it were committed after the time mentioned in the declaration.

1 Inst. 283; Cro. Eliz. 32; 5 Mod. 286.

If the trespass charged in an action of trespass be not laid with a *continuando*, the plaintiff can only give evidence of one trespass.

Skin. 641, *Wilson v. Powell*; Salk. 639.

Although the trespass charged in an action of trespass be laid with a *continuando* for the whole time, from the day on which the first trespass is charged in the declaration until a subsequent day therein mentioned, it is not necessary for the plaintiff to prove a continuance of the trespass for the whole time.

Skin. 641, *Wilson v. Powell*.

If the declaration in an action of trespass charge a trespass with a *continuando* to a time subsequent to the bringing of the action, evidence may be given of a continuance to the time of bringing the action; because the plaintiff may recover for the continuance to this time.

Stra. 1095, *Webb v. Turner*; Andr. 250, S. C.; 2 Mod. 253.

¶ If the plaintiff intends to give evidence of repeated acts of trespass, he must confine himself to the time in the declaration, whether laid with a *continuando*, or with "divers days and times;" but he may waive the time

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in the declaration, and prove a *single* trespass at any time before action brought.

1 Will. Saund. R. 24; 1 Stark. N. P. C. 357.||

If the plaintiff, in an action of trespass *quare clausum fregit*, have set out a title in a case wherein it was not necessary so to do, it is not necessary to prove the title.

2 Bulst. 288, Willamore v. Bamford.

Every abuttal of the close in which the trespass is charged, which is set out in the declaration in an action of trespass *quare clausum fregit*, must be proved with some degree of exactness.

2 Roll. Abr. 677; Dyer, 161. ||See 2 Bing. 49.||

If the trespass charged in this action be alleged in a close abutting towards the south upon a windmill in the occupation of J S, it must not only be proved that the close did abut towards the south upon a windmill, but that the windmill upon which it did abut was in the occupation of J S.

2 Roll. Abr. 677, Nowell v. Sands.

But it is not necessary that an abuttal should be proved precisely as it is set out in the declaration in an action of trespass *quare clausum fregit*.

If the trespass charged in this action be alleged in a close abutting towards the south upon a windmill, it is sufficient to prove that there is a windmill towards the south of the close, although it likewise come out in evidence that there is a highway between the close and the windmill.

2 Roll. Abr. 688, Nowell v. Sands.

If the trespass charged in this action be alleged in a close abutting upon a close called A towards the east, and it be proved that the situation of the close called A is towards the north of the close in which the trespass is charged, yet if it be likewise proved that it is a point or two towards the east thereof, this is sufficient proof of the abuttal.

2 Roll. Abr. 678, Mildmay v. Dean.

It is said by Holt, C. J., that if the *venue* in an action of trespass *quare clausum fregit* be laid in the parish of *Needham*, it is not sufficient for the plaintiff to prove a trespass in the parish of *Needham Market*.

Salk. 452.

||Where the declaration in trespass *quare clausum fregit* stated the premises to be in the parish of *Clerkenwell*, and it appeared that there were two parishes, St. James and St. John, Clerkenwell, but that the parish was generally known by the name of *St. James, Clerkenwell*, it was held a fatal variance.

Taylor v. Hooman, 1 Moo. 161; and see 8 Taunt. 539.

So where in ejectment the premises were described as "in the united parishes of St. G. in the Fields, and St. Giles's, B," and it appeared that the two parishes were entirely distinct, except as to the maintenance of their poor, the variance was held fatal.

Goodtitle v. Lammiman, 2 Camp. 274; S. C. 6 Esp. Ca. 128; *sed vide* 4 Taunt. 671.

And where the premises were laid to be at *Farnham*, and proved to be at *Farnham Royal*, it was held no variance, unless it were proved that there were two Farnhams.

Doe v. Salter, 13 East, 9; and see 4 Barn. & A. 616.

And where they were described as "in the parish of *Westbury*," and

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were situated in *Westbury upon Severn*, it was held no variance, although there was also another *Westbury*.

Doe v. Harris, 5 Maul. & S. 326.¶

If the declaration in an action of trespass charge the taking of a stack of corn, and the plaintiff only prove the taking of eight comb of corn out of the stack, he is entitled to recover for so much.

2 Roll. Abr. 684, pl. 6.

But if an action of trespass be brought for cutting down trees, and the plaintiff only prove a lopping of the trees, he is not entitled to recover.

And it is said that the plaintiff in this action cannot recover, if it appear in evidence that the trees were stubbed.

Dyer, 26, 27; 2 Roll. Abr. 720.

If an action of trespass be brought for the mesne profits of premises, which have been recovered in an action of ejectment, it is sufficient, whether the action be brought in the name of the nominal plaintiff or of the lessor of the plaintiff, to prove the value of the premises; for the defendant cannot in either case controvert the title of the plaintiff.

1 Sid. 239; 1 Barn. 456. ¶That is, if the plaintiff proceed only for mesne profits subsequent to the ouster in the ejectment; but if he proceed for antecedent profits, he must prove his title. See tit. *Ejectment*, Vol. iii. p. 301.¶

If after judgment by default against the casual ejector an action of trespass for the mesne profits be brought by the lessor of the plaintiff, in the name of the nominal plaintiff, in the action of ejectment, he cannot recover unless he prove an actual possession of the premises in himself.

Barn. 456, *Stanynought v. Cosins*.

An action of trespass for the mesne profits was brought by the lessor of the plaintiff, in the name of the nominal plaintiff in the action of ejectment, after judgment by default against the casual ejector. At the trial of the cause the plaintiff proved the judgment, the writ of possession and the return of possession delivered thereupon, the occupation of the premises by the defendant, and the value thereof. It was insisted, that, as the judgment was against the casual ejector and not against the tenant in possession, all this did not sufficiently prove an actual possession in the lessor of the plaintiff: but Lord Mansfield, C. J., before whom the cause was tried, was of opinion that it did; and all the judges, upon the case being referred to them, concurred with him in opinion. The opinion of the judges, which was delivered by Lord Mansfield, was to this effect:—Although the names of fictitious parties are made use of in an action of ejectment, the lessor of the plaintiff and the tenant in possession are to be considered as the real parties; and if so, the lessor of the plaintiff does as well obtain an actual possession by the delivery of possession under a writ of possession, when the judgment is by default against the casual ejector, as when it is upon a verdict against the tenant in possession.

MS. Rep. *Aslin v. Parkin*, Mich. 32 G. 2, in B. R.; [S. C. 2 Burr. 665.] [See *Adams on Ejectment*, 335, (2d edit.,) and tit. *Ejectment*, (H), Vol. iii.¶]

In a case reserved in an action of trespass, it was stated, that the property in a certain wall was in the plaintiff, and that he had not many years ago built a summer-house thereupon; but that the occupiers of a house in which the defendant dwelt had from time to time, for fifty years past, nailed fruit trees to the wall; and the question was, If this was evidence of such a possession of the wall in the defendant as ousted the plaintiff of his possession,

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and consequently took away his right of action against the defendant for nailing fruit trees thereto. It was holden not to be so. And by Pratt, C. J. —The long enjoyment would perhaps have been evidence of a license to nail fruit trees to the wall, in case a license had been pleaded: but if this should be allowed to be evidence of possession of the wall in the defendant, sufficient to oust the plaintiff of his possession, it would tend to introduce confusion of property; it being the practice in all places for persons to nail fruit trees to the walls of their neighbours. The case which has been cited, wherein it was holden that J S had the possession of a mine, although it was under ground in the possession of J N, is not like the present case. In that case J S was in the actual possession of the mine, and the only question was, Whether, as his possession had been obtained by beginning to dig in ground in his own possession, and afterwards digging secretly under ground in the possession of J N, it was a rightful one: but in the present case the defendant never was in the possession of the wall; for the plaintiff has all along been in the possession thereof, and not many years ago built a summer-house thereupon.

MS. Rep. Hawkins v. Waller, Trin. 3, G. 3, in C. B. || See Cubitt v. Porter, 8 Barn. & C. 262.||

If the defendant, in an action of trespass *quare clausum fregit*, justify in a close by name, the plaintiff, if he make a new assignment, cannot give evidence of a trespass in the close justified in; for by making a new assignment he has waived the right of doing this.

Cro. Eliz. 493, Freeston v. Crouch.

It is in the general true, that the plaintiff in an action of trespass cannot give evidence of any injury which is not expressly charged in the declaration. But where an injury arises *ex turpi causâ*, as from debauching a daughter of the plaintiff, the law, for the sake of preserving the chastity of the record, does allow this to be given in evidence in an action of trespass under the general words *and other wrongs*.

1 Sid. 225, Sippora v. Basset; Cro. Ja. 534; {Peake N. P. 46, Lowden v. Goodrick; Ibid. 62, Pettit v. Addington; 1 Mass. T. Rep. 47, Rising v. Granger.} || *Ante*, 505, note.||

If an injury for which an action of trespass lies be charged in the declaration, the plaintiff may, after proving this, give evidence of any circumstance charged in the declaration, which attended the injury, in aggravation of damages: although an action of trespass could not be maintained on the account of that circumstance alone.

The declaration in an action of trespass charged the breaking and entering of the plaintiff's house, and the beating of his children; and there was a general verdict for him with entire damages. On a motion in arrest of judgment it was insisted, that the plaintiff could not recover for the beating of his children; because it is not alleged, that he had received any special damage from thence. It was holden that the plaintiff ought to have judgment: And by the court—This action is brought for breaking and entering the house, and what is further alleged is only to show the enormity of the trespass. The plaintiff cannot recover any damages in this action for the loss of his children's service, nor could he give this in evidence; because he may bring another action for that injury: but he had a right to give the beating of the children in evidence in the present action, it being a circumstance which attended the breaking and entering of his house, in order to aggravate the damages.

Salk. 642, Newman v. Smith.

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The plaintiff in an action of trespass declared, that the defendant broke and entered his house, and made an assault upon his wife. A general verdict being found for the plaintiff with entire damages, it was insisted, on a motion in arrest of judgment, that the plaintiff, although he has not entitled himself thereto by laying a *per quod servitium amisit*, would by this verdict recover a satisfaction for the assault upon his wife, which he ought not to do: because, as the wife has not joined in this action, a right of action would survive to her, and consequently she might, notwithstanding the recovery of the husband in the present action, hereafter bring another action for the same injury. The rule for arresting the judgment was discharged. And by the court—The plaintiff in an action of trespass may join that in his declaration, in order to aggravate the damages, for which he cannot recover singly; and for which another person may maintain an action. In this case the authority of *Newman v. Smith* was expressly recognised.

Stra. 61, *Dix v. Brookes*; {3 *Mass. T. Rep.* 222, *Heminway v. Saxton*.}

|| Where the declaration was for breaking and entering plaintiff's house, and without any probable cause, and under a false charge and assertion that plaintiff had stolen property of defendant, searching and ransacking, &c., by reason of which plaintiff was interrupted in the enjoyment of his house, and his credit injured, the court held, that the trespass was the substantive allegation, and that the rest was matter of aggravation only; and though the false charge was not to be left to the jury as a distinct and substantial ground of damages, yet all the circumstances attending the trespass might be properly proved, and the jury would take the whole into consideration in estimating the damages. It is always the practice to give in evidence the circumstances which accompany and give a character to the trespass.

Bracegirdle v. Orford, 2 *Maul. & S.* 77; and see *Huxley v. Berg*, 1 *Stark. Ca.* 98; *Sears v. Lyons*, 2 *Ibid.* 318; *Merest v. Harvey*, 5 *Taunt.* 442; 1 *Marsh.* 139, *S. C.* In an action of trespass, the plaintiff cannot be allowed to give evidence, for the purpose of enhancing the damages, that a *legal prosecution* was commenced against him with a malicious motive. *Taylor v. Alexander*, 6 *Ohio*, 146.

Every thing which amounts to a denial of the right of action may be given in evidence by the defendant in an action of trespass upon the general issue.

|| The general issue, not guilty, evidently amounts to a denial of the trespasses alleged, and no more. Therefore, if in trespass for assault and battery the case be that the defendant has not assaulted or beat the plaintiff, it will be proper that he should plead the general issue; but if his case be of any other description, the plea will be inapplicable. So, in trespass *quare clausum fregit*, or for taking the plaintiff's goods, if the defendant did not in fact break and enter the close in question, or take the goods, not guilty is the proper plea. It will also be applicable if he did break and enter the close, but it was not *in possession of the plaintiff or not lawfully in his possession*, as against the better title of the defendant. So it will be applicable if he did take the goods, but they did not belong to the plaintiff. For as the declaration alleges the trespass to have been committed on the close or goods *of the plaintiff*, not guilty involves a denial that the defendant broke and entered the close or goods of the plaintiff, and is therefore a fit plea if the defendant means to contend that the plaintiff had no possession of the close, or property in the goods sufficient

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to entitle him to call them his own. But, if the defence be of any other kind, the general issue will not apply.

Stephen on Pleading, p. 178; and see 3 Bing. 135; 7 Term R. 354; Stephen, 179.

Thus, if the defendant did the act complained of under an authority from the plaintiff, this must be specially pleaded.^(a) And Lord Ellenborough held, that in trespass for driving against plaintiff's post-chaise, the defendant could not, on "not guilty," show that the collision happened by accident, or by plaintiff's negligence.^(b)

^(a) Milman v. Dolwell, 2 Camp. 378. ^(b) Knapp v. Salsbury, 2 Camp. 500; but this seems contrary to Salk. 637; Lord Ray. 38; 3 Wils. 411; 1 Chitt. on Plead. 514.

In trespass to the person, any justification of the act under authority of law must be pleaded specially, except in cases where particular statutes authorize the giving the defence in evidence on the general issue.

1 Chitty on Pleading, 494, and cases there cited; || *β* Carson v. Wilson, 6 Halst. 43.

A lease for years may be given in evidence in an action of trespass *quare clausum fregit* upon the general issue; because this, which is a denial of the possession of the plaintiff, amounts to a denial of the right of action.

Bro. Gen. Iss. pl. 82. {So title may be given in evidence on the general issue. *Ante*, p. 523.}

But a lease at will cannot in this action be given in evidence upon the general issue; because such lease, which amounts only to a license, ought to have been pleaded.

Bro. Gen. Iss. pl. 82.

An action of trespass *quare clausum fregit* being brought for breaking the close and eating the germins of the plaintiff there growing, it appeared that the defendant claimed under a lease for years, in which there was a reservation of the trees; that some of the trees had been cut down; and that the germins, for the eating of which by the defendant's cattle the action was brought, grew from the roots thereof. It was holden, that as the defendant, who had a right of depasturing his cattle in the close, could not prevent them from eating the germins, the right of eating them might be given in evidence upon the general issue; because it amounted to a denial of the right of action.

Sir W. Jones, 388, Clitherow v. Higgs. || But *qu.* whether this should not be specially pleaded, since the plea seems matter of excuse. See 8 East, 404.||

||If the defendant in his justification state a grant to him of the *locus in quo*, this imports an interest in the soil; and if it appear in evidence that he has only a *partial* interest, as the first crop of the produce, the issue on the plea must be found against him.

Stammers v. Dixon, 7 East, 207.||

If an action of trespass be brought for taking a personal chattel, the defendant may, upon the general issue, give in evidence a gift thereof by the owner; because this, which amounts to a denial of the plaintiff's property, is a denial of the right of action.

1 Inst. 283; Bro. Gen. Iss. pl. 46; ||Lake v. Billers, 1 Ld. Ray. 733; Martin v. Podger, 2 Black. R. 701; Badkin v. Powell, Cowp. 476.||

But the taking of a personal chattel as a deodand cannot be given in evidence by the defendant in this action upon the general issue; because, as this does not amount to a denial of the plaintiff's property, it ought to

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have been pleaded, and then the plaintiff would have had an opportunity of giving an answer thereto.

Stra. 61, Dryer v. Mills.

If one tenant in common bring an action of trespass *quare clausum fregit* against another, the latter may upon the general issue give in evidence that he is tenant in common with the plaintiff; for this amounts to a denial of the right of action.

Salk. 4, Haywood v. Davies. ||See 8 Barn. & C. 262.||

But if one tenant in common bring this action against a stranger, the stranger cannot give in evidence upon the general issue that J N, who is not named in the writ, is tenant in common with the plaintiff; because this ought to have been pleaded in abatement.

Salk. 4, Haywood v. Davies. ||See 8 Barn. & C. 262.||

It is in the general true, that the defendant in an action of trespass cannot give any matter in evidence upon the general issue, which amounts to a justification or excuse of the act complained of, or to a discharge of the trespass; because every such matter, as it does not amount to a denial of the right of action, ought to have been pleaded.

1 Inst. 283; Salk. 287; 12 Mod. 412.

A license cannot be given in evidence in this action upon the general issue; because this ought to have been pleaded in justification.

Cro. Eliz. 245, Taylor v. Fisher; Bro. Tresp. pl. 295; [2 Term. R. 168.]

The defendant in this action cannot give in evidence upon the general issue, that his beast escaped into the plaintiff's close through the fence of the plaintiff which was out of repair; because this ought to have been pleaded in excuse.

1 Inst. 283; Keilw. 203.

But the defendant in an action of trespass is in divers cases enabled by statutes to give the special matter in evidence upon the general issue, notwithstanding it amounts to a justification.

By the 7 Jac. 1, c. 5, it is enacted, "That if an action of trespass be brought against any justice of the peace, mayor, or bailiff of any city or town corporate, headborough, portreeve, constable, tithingman, or collector of any subsidy, or for any thing by him done by virtue or reason of his office; or against any other person, for any thing by him done in aid or assistance of or by the commandment of either of these touching or concerning his office, it shall be lawful for the defendant to plead the general issue, and to give any special matter in evidence, which, had it been pleaded, would have been sufficient in law to have discharged such defendant of the trespass."

By the 11 Geo. 2, c. 19, § 2, it is enacted, "That if an action of trespass be brought against a person entitled to rents or services of any kind, or his or her bailiff, receiver, or other person relating to any entry by virtue of this act, or otherwise, upon any premises chargeable with such rents or services, or to any distress or seizure, sale or disposal of any goods or chattels thereupon, it shall be lawful for the defendant in such action to plead the general issue, and to give the special matter in evidence, any law or usage to the contrary notwithstanding."

And without mentioning any other statute in particular, it may in the general be observed, that in almost every statute, which has of late years

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been made for amending a highway, or for doing any thing of public concern, there is a clause to the same effect.

[See also Dougl. 283; 2 Black. R. 1254.]

It is in the general true, that the defendant in an action of trespass cannot give a matter in evidence upon the general issue, which might have been pleaded in bar.

6 Mod. 135, Dove v. Smith. ¶ *Liberum tenementum* is an exception to this rule.¶

But in some cases a matter which cannot be pleaded in bar of an action of trespass, may be given in evidence by the defendant upon the general issue in mitigation of damages.

¶ Only where it cannot be pleaded in bar, 2 Bos. & P. 224, and 225, note (a)¶

It cannot be pleaded in bar of an action of trespass, that the goods for the taking of which it is brought have been restored to the plaintiff; but this may be given in evidence by the defendant on the general issue in mitigation of damages; for although the plaintiff be entitled to recover, he ought only to recover damages for taking the goods and detaining them until they were restored.

Bro. Gen. Iss. 22, pl. 11, pl. 15.

If an action of trespass be brought by a rightful executor against an executor *de son tort*, the latter cannot plead payment of the testator's debts, to the amount of the assets which came to his hands in bar of the action; but he may give this in evidence upon the general issue in mitigation of damages.

12 Mod. 441. ¶ See Toller's Law of Exec. 364, *acc.*¶

If an action of trespass be brought by a husband for criminal conversation with his wife, the defendant cannot plead a license from the husband, because a husband has not a power to grant such license in bar of the action; or that the wife was a lewd woman, because it does by no means follow that he had a right to do what he is charged with having done; but he may give either of these matters in evidence upon the general issue in mitigation of damages.

12 Mod. 232, Coot v. Barty. [But the husband's consent goes not in mitigation of damages, but in bar of the action. *Volenti non fit injuria.*] ¶ 2 Term R. 166, n.¶

§ In trespass for assault, held, that strong provocation, as a libel on the defendant by the plaintiff, although previous, was admissible in mitigation of damages under the general issue.

Frazer v. Berkley, 2 M. & Rob. 3.

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TRESPASS against two, the jury cannot sever the damages, but they may acquit one and find the other guilty.

Ridge v. Wilson, 1 Blackf. 410.

Trespass against five, the plaintiff accepts a note from two, for a sum to be paid at a future day, in satisfaction as to them, but not to operate as a satisfaction for the other defendants; the right to recover damages is gone as to all.

Ellis v. Bitzer, 2 Ohio, 91. See Allen ads. Craig, 2 Green, 102.

In an action of trespass against two, if they severally plead not guilty, and a verdict is rendered against one, the plaintiff may proceed for his damages against the other.

M'Daniel v. Waggoner, 1 Tenn. 252.

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In trespass *quare clausum fregit*, the jury may assess damages for the injury resulting to the character of the plaintiff, by an illegal search for stolen goods. *Quære.*

Falkener v. Alderson, Gilm. 221.

Where the injured party has obtained a verdict for damages in taking goods, the property is changed, and the right to the goods is vested in the defendant.

Woolley v. Kean, 2 Halst. 85; *Sturtevant v. Waterbury*, 2 Hall, 449; *Clark v. Hallock*, 16 Wend. 607.

In trespass against several defendants, they are not entitled to separate trials, and the jury are not required to assess the damages severally against each defendant.

Allen ads. Craig, 1 Green, 294. See *Rochester v. Anderson*, 1 Bibb, 439; *Doughterty v. Dorsey*, 4 Bibb, 207; *Stone v. Matherby*, 3 Monroe, 137.

Actions of trespass and for assault and battery, are, in their nature, vindictive, and when a jury give exemplary damages, the court will not in general interfere, unless they are manifestly outrageous.

Allen ads. Craig, 1 Green, 294.

Damages for an injury to real estate ought to bear a fair and just proportion to the loss occasioned by them.

Thompson v. Morris Canal and Banking Company, 1 Har. 480.

In an action of trespass *vi et armis* for the destruction of, or injury to chattels, in their assessment of damages the jury are not restricted to the mere pecuniary loss sustained by the plaintiff, but may give damages for the malicious conduct of the defendant and the degree of insult with which the trespass was committed.

Duncan v. Stalcup, 1 Dev. & Batt. 440.

If the trespass be not entire, and one defendant be guilty of a part of it, and another be not guilty of that, but be guilty of another part, then the jury not only may, but should find several damages.

Sodousky v. M'Gee, 4 J. J. Marsh. 269.

On an illegal seizure at sea, the original wrongdoer may be made responsible for the loss actually sustained in a case of gross and wanton outrage, but the owners of a privateer, who are constructively liable, are not bound to the extent of vindictive damages.

The Amiable Nancy, 3 Wheat. 546.

The extraordinary expenses in vindicating the right of the plaintiff, such as counsel fees and expenses of witnesses, beyond the taxable costs, ought not to be considered in estimating damages in cases of torts.

Whittemore v. Cutler, 1 Gallis. 429.

In cases of illegal capture, when the vessel and cargo have been totally lost to the owner, the proper measure of damages is the prime value and interest; in cases of gross illegality damages may be restricted to demurrage and interest on the principal of the captured property.

The Lively, 1 Gallis. 315.

When the owner of a vessel is sued for an injury done to the plaintiff's goods by neglect of the master, the proper measure of damages is the dif-

§ (L) Of Damages in the Action of Trespass.

ference between the prime cost and charges, and the amount of the sales, not the probable profits if the goods had gone safe.

Dusar v. Murgatroyd, 1 Wash. C. C. 13. See 1 Gallis. 315; The Anna Maria, 2 Wheat. 327.

In trespass for entering mines of the plaintiff, and taking coals, the plaintiff proved the working of them within eighty yards of the *locus in quo*, and the admission of the defendant that he had got the coals: held sufficient for the jury to presume possession in the plaintiff, and that the defendant was not entitled to have deducted, from the value of the coals raised, the expense of raising.

Wild v. Holt, 9 Mees. & W. 672.

Where the defendant had cut and carried away a strip of the plaintiff's adjoining land, in the course of making and widening a ditch; held, that the measure of damages was the value of the land, and not the expense of restoring it to its original state.

Jones v. Gooday, 8 Mees. & W. 146.

In trespass for injuries to property, the law furnishes no precise rule of damages; but the jury must judge, under all the circumstances attending the transaction, to what damages the plaintiff is entitled.

Denison v. Hyde, 6 Conn. 509.

In trespass *vi et armis*, the damages are not limited to the value of the property destroyed.

Edwards v. Beach, 3 Day, 447.

The circumstances which accompany and give character to a trespass, may always be proved, to enhance the damages beyond the pecuniary loss sustained by the plaintiff; therefore, where in an action of trespass *de bonis asportatis*, it appeared that the defendant opened the chest of the plaintiff, containing her wearing apparel, and made use of language in relation to it, which wounded her feelings; it was held, that these circumstances were proper to be considered in assessing the damages.

Treat v. Barbour, 7 Conn. 274. See 10 Conn. 384.

In trespass for taking goods, alleged in the declaration to be of a certain value, when the plaintiff recovers, the damages to be assessed, so far as they depend on the value of the goods, are to be restricted to the value alleged.

7 Conn. 274.

The principle upon which damages are given in an action of trespass, is to indemnify the plaintiff for what he has actually suffered, taking into consideration all those circumstances which give character to the transaction.

Bateman v. Goodyear, 12 Conn. 575.

In action for debauching a daughter, damages cannot be allowed the plaintiff for bringing up the daughter's child.

Sergeant v. ———, 5 Cowen, 106.

In such action, where the conduct of the daughter was lewd, the plaintiff is entitled only to a strict recompense for the loss of her service during the pregnancy, particularly when he had connived at the seduction.

Fletcher v. Randall, Anth. N. P. 196. See Seagar v. Sligerland, 2 Caines, 219.

Trespass lies for an entry upon land and an ouster of the plaintiff, but damages can be recovered only for the simple entry and ouster, and not

Trial.

for the continuance of the trespass. Damages for such continuance are not recoverable until after the plaintiff has gained possession by re-entry.

Holmes v. Seely, 19 Wend. 507.

In trespass or trover, if the property be taken by a stranger, the special property man may recover the whole value, holding the balance beyond his own interest in trust for the general owner; but if the suit be brought against the latter, he is entitled to a deduction of the value of his interest.

King v. Dunn, 21 Wend. 253.

TRIAL.

THERE are several methods of trial which have for many years been discontinued, of which it would not be foreign to the present title to give an account; but as this has been done by divers authors, and nothing new can be thereto added, they are omitted.

As divers things, which might very well have been treated of under this title, have already been treated of under the titles "ACTIONS LOCAL AND TRANSITORY," "BILL OF EXCEPTIONS," "EVIDENCE," and "JURORS," it is not necessary to repeat any of these.

Another thing which might likewise very well have been treated of under this title, namely, *Verdict*, shall be treated of under the title "VERDICT."

The remaining matter which appertains to this title shall be arranged in the following order:

(A) Of a Trial by the Court.

1. *In the General.*
2. *Upon Inspection.*
3. *Upon the Examination of Witnesses.*

(B) Of a Trial by a Record.

(C) Of a Trial by a Certificate.

(D) Of a Trial by a Jury.

(E) Of a Trial at Bar.

(F) Of a Trial at *Nisi Prius*.

(G) Of Notice of Trial.

(H) Of putting off a Trial.

(I) At what Time an Indictment may be tried before Justices of Oyer and Terminer.

(K) Of the Manner of trying, where more than one Issue is to be tried.

(L) Of granting a new Trial.

1. *In the General.*2. *After a Trial at Bar.*3. *On account of a Defect or Mistake of the Judge before whom the Cause was tried.*4. *On account of a Defect, Mistake, or Fault of the Jury by whom the Cause was tried.*5. *On account of a Neglect or Mistake of a Counsellor or an Attorney in the Cause.*

(A) Of a Trial by the Court.

6. *On account of a Neglect, Mistake, or Fault of one of the Parties, or one of his Witnesses.*
7. *In an Action of Ejectment.*
8. *In a Penal Action.*
9. *In an Indictment or Information.*

(A) Of a Trial by the Court.

1. *In the General.*

EVERY question of law arising in a cause is to be tried by the court, it being an universal maxim, that *cuiuslibet in arte sua perito est credendum*; and it being a maxim of law, that *ad questionem juris non respondent juratores*.

1 Inst. 125.

If a question arise, whether a certain sentence be a maxim of law, it is to be tried by the justices.

Bro. *Trial*, pl. 143.

A question concerning the practice of a court is to be tried by the court; for the practice of every court is the law of that court.

9 Rep. 30, Abbot of Strata Marcella's case; 12 Mod. 572, 573. β In Indiana, if on an appeal to the Circuit Court neither party require a jury, the cause may be tried by the court, though the amount in controversy exceed twenty dollars. *Minton v. Moore*, 4 Blackf. 315.γ

It is the province of the justices to determine what the meaning of a word or sentence in an act of parliament is.

Bro. *Trial*, pl. 143; 2 Inst. 611.

If a man, who at the time of his death was seised of a house, had any goods therein, his executors or administrators shall have a *reasonable time* to take them away; and the justices shall judge what is a reasonable time.

1 Inst. 56. β As to what shall be considered reasonable time, see 6 East, 3; 7 East, 285; 3 B. & P. 599; Bayl. on Bills, 239; 7 Taunt. 159, 397; 15 Pick. 92; 3 Watts, 339; 10 Wend. 304; 13 Wend. 549; 1 Halls' R. 56; 6 Wend. 369, 443; 1 Leigh's N. P. 435; Co. Lit. 56; Bouv. L. D. h. v.γ

||So also the judges, as it is now settled, decide what is or is not a reasonable time for the presentment of bills and notes, and giving notice of their dishonour,—the jury finding the facts; as the distance, the hours of post, &c., &c.

Bayley on Bills, (4th ed.) See Chitty on Bills, 163, 270, (6th ed.)||

The reasonableness of a fine, which has been assessed by the lord of a manor on the admission of a tenant to a copyhold estate, shall be determined by the justices upon the circumstances of the case.

1 Inst. 56; ||4 Rep. 27 b; 13 Rep. 1; Cro. Car. 196; Cru. Dig. vol. 1, 320; 6 East, 56.||

If a question arise concerning the existence of a general custom, it is to be tried by the justices; because every general custom is a part of the common law.

Bro. *Trial*, pl. 143; 12 Mod. 573.

It is in the general true, that a question concerning the existence of a custom of a particular place is to be tried by a jury.

Bro. *Trial*, pl. 143.

(A) Of a Trial by the Court.

But if a question arise concerning the existence of a custom of the city of London, it is, unless the corporation be interested in the establishment of the custom, to be tried by the certificate of the mayor and aldermen.

1 Inst. 174; 2 Roll. Abr. 579, 580.

A question concerning the legal effect of a deed is to be tried by the court; because this, which depends upon the construction of the deed, is a question of law.

1 Inst. 225; Bro. *Condition*, pl. 183; 2 Freem. 146.

If a question arise, whether a deed have been sealed and delivered, this, it being a question of fact, is to be tried by a jury.

1 Inst. 225.

It is the province of a jury to try, whether a rasure or interlineation in a deed were made before the delivery of the deed, this being a question of fact.

1 Inst. 225.

But if the question be, whether the rasure or interlineation in a deed be of a thing material, it is to be tried by the court; because this question, which depends upon the construction of the deed, is a question of law.

1 Inst. 225.

¶ If parties appear and go to trial without a plea being put in, the statute of amendments will not apply to cure the defect.

Brazzle v. Usher, 1 Breese, 14. See *Swan v. Rary*, 2 Blackf. 292.

Granting a new trial is matter of legal discretion of the court, who will be guided by the nature and particular circumstances of the case.

Steinmetz v. Curry, 1 Dall. 254; *Jourdan v. Meredith*, 3 Yeates, 318; *Commonwealth v. Eberle*, 3 Serg. & R. 9.

The court may lay the party applying for a new trial under equitable terms.

Walker v. Long, 2 P. A. Browne, 135.

The rule that the court will not grant a new trial in a hard case, does not apply to the case of a surety.

Commissioners v. Ross, 3 Binn. 520.

A new trial will not be granted on a point of law, not made at the trial, except, perhaps, when the applicant would be without a remedy.

Peters v. Phoenix Ins. Co., 3 Serg. & R. 25.¶

2. Upon Inspection.

[Trial upon inspection, or examination, is, when for the greater expedition of a cause, in some point or issue, being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it, who are properly called in to inform the conscience of the court in respect of *dubious* facts; and therefore when the fact, from its nature, must be evident to the court, either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone.

3 Bl. Comm. 331.] ¶ See *Steph. Pl.* 123.¶

(A) Of a Trial by the Court.

If a person would avoid or reverse an act, because it was done during his nonage, the question, whether he were of full age at the time it was done, is sometimes to be tried by a jury, at other times by the court upon inspection of the person.

If the act, which a person would avoid, because it was done during his nonage, were an act *in pais*, the question whether he were of full age at the time it was done, is to be tried by a jury.

1 Inst. 380; 1 Sid. 222.

But if a person would avoid or reverse a judicial act because it was done during his nonage, the question, whether he were of full age at the time it was done, is to be tried by the court upon inspection; for every judicial act shall be intended to have been rightly done until the contrary appear; and it is more proper that it should be tried by the court than by a jury, whether the act were rightly done.

1 Inst. 380.

An act *in pais*, which is voidable because it was done during nonage, may be tried by the court upon inspection after the party who would avoid or reverse it is of full age.

1 Inst. 380.

There is some disagreement in the books as to the point, but it seems to be the better opinion, that a judicial act cannot be tried by the court upon inspection, after the party who would avoid or reverse it is of full age.

1 Bulst. 206; 1 Inst. 380; 1 Sid. 321.

If there have been a trial by the court upon inspection during the nonage of a person, and he be recorded to be within age, a judicial act may be avoided or reversed by him after he is of full age, because it was done during his nonage.

1 Inst. 380; Cro. Ja. 50.

If the conusee delay the engrossing of a fine, of which an infant is conusor, the court will at the prayer of the infant try his age by inspection, in order to prevent him from being precluded from bringing a writ of error, in case he should be of full age before the fine is engrossed.

Moor. 189; Cro. Ja. 230.

If a writ of error be brought to reverse a fine, and the error assigned be nonage of the plaintiff in error at the time of levying the fine, the question, whether he be of full age, is to be tried by the court upon inspection.

Cro. Eliz. 616, *Graves v. Short*; 2 Roll. Abr. 572, pl. 2; 9 Rep. 30.

If a writ of error be brought to reverse a recovery by default in a real action, and the error assigned be nonage of the plaintiff in error at the time of suffering the recovery, the question, whether he be of full age, is to be tried by the court upon inspection.

1 Inst. 380.

But if a recovery have been suffered against the attorney of a person, and, upon a writ of error brought to reverse it, the error assigned be nonage of the plaintiff in error at the time of making the warrant of attorney, the question, whether he be of full age, is to be tried by a jury; because the making of the letter of attorney was an act *in pais*.(a)

1 Sid. 322; *Raby v. Robinson*, 1 Lev. 142. ||(a) But the law is now otherwise; for it is now the common practice for infants having obtained a privy seal for that purpose, to suffer common recoveries; and the law seems to have been so settled ever

(A) Of a Trial by the Court.

since Blount's case, Hobart R. 196; which recovery was afterwards held good on writ of error, and infancy assigned for error. See W. Jones, 318; Cro. Car. 307; where the case is reported under the names of Earl of Newport v. Sir H. Mildmay. See 2 Salk. 567; Co. Lit. 380 b, note (1).||

If an *audita querela* be brought to avoid a recognisance, because it was entered into during the nonage of the plaintiff, the question, whether he be of full age, is to be tried by the court upon inspection.

10 Rep. 43, Mary Portington's case; Carth. 278, 279.

It is laid down in one book, that if in an action of account issue be joined upon the plea of infancy, the question, whether the defendant be of full age, is to be tried by the court upon inspection.

2 Roll. Abr. 472, pl. 9.

But it is in another book laid down, that the question, whether a person be of full age, is always to be tried by a jury, unless the validity of a judicial act depend upon the question.

1 Inst. 380.

In an appeal of mayhem, the court may, at the prayer of the defendant, try upon inspection of the part, whether there be a mayhem.

Bro. *Appeal*, pl. 46; Bro. *Trial*, pl. 57; 2 Hawk. P. C. c. 23, § 27.

As the court have a power, in case the defendant in an appeal of mayhem pray it, to try upon inspection of the part whether there be a mayhem, the plaintiff in an appeal must always appear in person, that the court may have an opportunity, in case it should be so tried, of inspecting the part.

Bro. *Trial*, pl. 37; 2 Hawk. P. C. c. 23, § 27.

If, where the trial is by the court upon inspection, there be a doubt upon inspecting, the court has a power of requiring or receiving other evidence.

2 Roll. Abr. 573, pl. 2.

If the question whether J S be of full age is tried by the court upon inspection, J S may at the time of inspection be examined by the court upon a *voir dire*, concerning his age.

2 Roll. Abr. 573, pl. 2.

An *audita querela* being brought to avoid an execution upon a recognisance, and the age of the recognisor being tried by the court upon inspection, the court examined his mother and another witness concerning the age of the party inspected, who both swore that he was not of full age. The court, being still doubtful, ordered a copy of the register of the parish where he was born to be produced.

Carth. 278, 279, Lloyd v. Eagle; 2 Roll. Abr. 573, pl. 4.

If the court, upon inspecting the part in an appeal of mayhem, be doubtful whether there be a mayhem, a writ may be awarded to the sheriff, to return some able physicians and surgeons for the better information of the court.

Bro. *Appeal*, pl. 46; Bro. *Trial*, pl. 57; 2 Hawk. Pl. C. c. 23, § 27.

[If a man be found by a jury an idiot *à nativitate*, he may come in person into the Chancery before the Chancellor, or be brought there by his friends, to be inspected and examined, whether idiot or not; and if, upon such view and inquiry, it appears he is not so, the verdict of the jury, and all the proceedings thereon, are utterly void, and instantly of no effect.

9 Rep. 31.

Upon a writ of error from an inferior court, that of Lynn, the error assigned was, that the judgment was given on a Sunday, it appearing to be

(A) Of a Trial by the Court.

on 26th February, 26 Eliz.; and upon inspection of the almanacs of that year it was found, that the 26th of February in that year actually fell on a Sunday: this was held to be a sufficient trial, and that a trial by jury was not necessary, although it was an error in fact; and so the judgment was reversed.

Cro. Eliz. 227.]

If the court, after having inspected and receiving other evidence, be still doubtful, it has a power of refusing to determine the matter in question, and may send it to be tried by a jury.

Bro. *Trial*, pl. 60.

3. Upon the Examination of Witnesses.

Every question, which arises upon a challenge to the array of the jury, is to be tried by the court upon the examination of witnesses; for unless every such question, although it depend upon a matter of fact, be so tried, there would be a delay of justice.

9 Rep. 32, Abbot of Strata Marcella's case. ||See *Rex v. Dolby*, 2 Barn. & C. 104.||

If a question arise, whether a piece of written evidence were delivered by one of the parties to the jury after they went from the bar, it is to be tried by the court upon the examination of witnesses.

Cro. Eliz. 616, *Graves v. Short*.

The defendant pleaded, that the plaintiff who had appeared by attorney was dead. Hereupon a person came into court, and said he was the plaintiff. This being denied by the defendant, it was holden to be a proper question for the determination of the court, upon the examination of the attorney, whether this were the person for whom he had appeared

9 Rep. 30, Abbot of Strata Marcella's case; Bro. *Exam.* pl. 35.

If in a writ of dower the issue be, whether the husband of the woman claiming dower be living, the issue is to be tried by the court upon the examination of witnesses.

Bro. *Trial*, pl. 36; 9 Rep. 30.

If an appeal be brought by a woman of the death of her husband, and the defendant plead that the husband is living, and issue be thereupon joined, the issue is to be tried by the court upon the examination of witnesses.

Bro. *Trial*, pl. 90; 9 Rep. 30.

If a question arise concerning a fact suggested to have been done beyond the seas, it is to be tried by the court upon the examination of witnesses; for a jury cannot be supposed to have any knowledge either of the fact, or of the witnesses who may be adduced to prove it.

2 Roll. Abr. 578, pl. 13, pl. 14, pl. 15. ||This arose from the old doctrine as to venue, when juries *de viceneto* were supposed to possess a knowledge of the facts and witnesses; but now that juries are taken from the county at large, and that transitory matters may be tried in any county, the doctrine no longer applies; and it is the common practice to try before juries *transitory* causes, wherein the whole or great part of the circumstances arose in a foreign country. But an action for a local injury committed abroad cannot be tried here. *Doulson v. Matthews*, 4 Term R. 503.||

If upon a trial by the court of a question of fact, upon the examination of witnesses, the court be doubtful, it has a power, provided it be not suggested that the fact was done beyond the seas, of sending the question to be tried by a jury.

Bro. *Trial*, pl. 60.

(B) Of a Trial by a Record.

Where a witness, who had retired, was called for re-examination, and the record did not show the point on which it was wished he might be re-examined, it was held, that the court was presumed to have acted correctly, for, after the examination of a witness, occasions may occur which may justify a re-examination.

Scott v. Mortsinger, 2 Blackf. 457. See Russell v. Martin, 2 Scam. 495.g

(B) Of a Trial by a Record.

EVERY question arising in a cause concerning a matter of record, is to be tried by the record ; because a record imports in itself such verity, that an averment contrary thereto is not to be received. The receiving of such averment would moreover be attended with great inconvenience ; for if one averment could be received to contradict a record, another might be received to contradict the second record, and so it might go on *ad infinitum*.

9 Rep. 30, Abbot of Strata Marcella's case ; 1 Inst. 117 ; Jenk. Cent. 99.

If an issue be joined upon the plea of *nul tiel* record, it is to be tried by the record.

Bro. Trial, pl. 40 ; 2 Roll. Abr. 574.

If a question arise concerning a privilege claimed by a city or borough under a charter, it is to be tried by the record of the charter.

Trial per Pais, 15.

The question, whether a man be an attorney of a court, is to be tried by the record in which the attorneys of the court are enrolled.

Stra. 76, Forster v. Cale ; Bro. Trial, pl. 6 ; Ld. Raym. 1173.

The question, whether an original writ were sued out, is to be tried by a jury ; because the writ is not recorded, until a return be made thereto.

Hob. 244, Peter v. Stafford.

If the question be general, whether a defendant did appear, it is to be tried by the record ; because the appearance ought to be entered upon the record.

Cro. Eliz. 131, Hoe v. Marshall.

But if the question be, whether a defendant appeared at a day certain, it is to be tried by a jury ; for it is not necessary that the day of appearance should be entered upon the record.

Cro. Eliz. 131, Hoe v. Marshall.

[In case of an alien, whether alien friend or enemy, shall be tried by the league or treaty between his sovereign and ours, for every league or treaty is of record.

6 Rep. 53 ; 3 Bl. Comm. 331. ||It would seem that the issue of alien may be tried by a jury, Wells v. Williams, 1 Ld. Raym. 283 ; and see 6 Term R. 23 ; and the league or treaty would be evidence on the issue.||

So, whether a manor be held in ancient demesne or not, shall be tried by the record of *domesday* in the king's exchequer.

9 Rep. 31.]

If the question be, whether a person were rendered at a day certain in discharge of his bail, it is to be tried by the record ; because the day of the render ought to be entered upon the record.

Hob. 210, Welby v. Canning.

(B) Of a Trial by a Record.

If the question be, whether a deed be enrolled, it is to be tried by the record of enrolment.

4 Rep. 71, Hynde's case.

But if the question be, at what time a deed was enrolled, it is to be tried by a jury; because it is not necessary, nor was it formerly the practice, to mention the time of enrolling a deed.

4 Rep. 71, Hynde's case; 2 Roll. Rep. 219.

If the question be, whether J S were sheriff of the county of A, it is to be tried by the record; because every sheriff is appointed by letters patent, which are always recorded.

9 Rep. 31, Abbot of Strata Marcella's case.

But if the question be, whether J N were under-sheriff to J S, it is to be tried by a jury; for the appointment of an under-sheriff is never recorded.

Bro. Trial, pl. 113.

If a sheriff, after having returned a *cepi corpus*, plead, to an action of escape, that the party never was in his custody, the question, whether the party was ever in the sheriff's custody, is to be tried by the record of the return.

2 Roll. Abr. 574, pl. 7.

But if a sheriff, who arrested J S, return *non est inventus*, the question, whether J S were arrested, is to be tried by a jury; because it depends upon the truth of the return, and not upon the import thereof.

2 Roll. Abr. 574, pl. 8.

If a man justify the having done a thing as a justice of the peace, the question, whether he were a justice of the peace, is to be tried by the record of the commission of peace.

2 Roll. Abr. 574, pl. 9.

If the question be, whether a person have a right to a peerage under a writ, it is to be tried by the record of the writ: but if the question be, whether a person have a right to a peerage by descent, it is to be tried by a jury; for it can never appear from the record, that the person claiming the peerage is descended from the person who was first created a peer.

Ld. Raym. 14, Rex v. Knollys; 12 Mod. 57.

If a matter of record be alleged merely by way of inducement to a matter of fact, the trial is to be by a jury; for the question in such case is not concerning a matter of record.

Palm. 524, Bigg v. Wharton.

If a question arise concerning a decree of the Court of Chancery, it is to be tried by a jury; the Court of Chancery, *quatenus* a court of equity, not being a court of record.

Trial per Pais, 156.

||An Irish judgment is not a record in England, and therefore the truth of it is triable by a jury and not by the court.

Collins v. Matthew, 5 East, 473; Harris v. Saunders, 4 Barn. & C. 411.||

If a record be pleaded, and an issue be joined upon the plea of *nul tiel* record, a day is given to bring in the record.

Bro. Fail. of Record, pl. 2.

If the record be a record of the court in which it is pleaded, and it be

(B) Of a Trial by a Record.

not brought in at the day, this is a failure of record ; because it was in the power of the party to bring it in.

Bro. *Fail. of Record*, pl. 2.

If the record pleaded be a record of a superior court, and it be not brought in at the day, this is a failure of record ; because, as a *certiorari* could not be sent from the court in which it is pleaded for removing the record of a superior court, it was incumbent upon the party who pleaded the record to bring it in. It was moreover in his power to remove the record by a *certiorari* into the Court of Chancery, and afterwards to bring it, by a *mittimus*, from the Court of Chancery into the court in which it is pleaded.

Bro. *Fail. of Record*, pl. 3. ¶ As to the mode of proceeding on trial by the record, see Tidd's Prac. 801, (8th ed.); 1 Saund. 92 a.¶

But if the record of an inferior court be pleaded, and a *certiorari* have been sued out from the court in which it is pleaded to the inferior court, and the record be not returned at the day, this is not a failure of record ; because the party who pleaded the record has not been guilty of neglect : but it is his duty to sue out an *alias certiorari*, and afterwards a *pluries*, and so to continue process, until the record is returned.

Bro. *Fail. of Record*, pl. 3.

Although some part of the record pleaded be not set out, this is not a failure of record : for it is not necessary that any more should be set out by the party who has pleaded a record than is material for him.

Bro. *Fail. of Record*, pl. 4.

If a man plead a record of a recovery of one acre, and the record brought in is of a recovery of two acres, this is not a failure of record ; for if two acres were recovered, one certainly was.

Bro. *Fail. of Record*, pl. 4.

If a man declare upon a recognisance of J S, and it appear, from the record brought in, that J S and J N were jointly and severally liable for the whole sum mentioned in the recognisance, this is not a failure of record ; it being sufficient to show, that J S was liable for the whole sum mentioned in the recognisance.

Bro. *Fail. of Record*, pl. 4.

A variance in the record brought in from the record pleaded, in an immaterial part, is not a failure of record.

If a record of outlawry of the plaintiff at the suit of J S be pleaded, and the record brought in be of outlawry of the plaintiff at the suit of J N, this is not a failure of record ; for the material question is, whether there be a judgment of outlawry of the plaintiff, and not at whose suit the judgment was.

Bro. *Fail. of Record*, pl. 1.

If the record brought in vary from the record pleaded as to a continuance, this is not a failure of record ; the continuance not being a material part of the record.

Hob. 179, *Coachman v. Halley*.

But a variance in the record brought in from the record pleaded, in a material part, is a failure of record.

If a man plead a record of a recovery against him by the name of *Curphey*, and the record brought in be of a recovery against a person of the

(C) Of a Trial by a Certificate.

name of *Scurffee*, this is a failure of record ; because it does not appear to be a recovery against the same person.

1 Barn. 333, *Eggleton v. Seneff*.

And for the same reason, if a record of outlawry of the plaintiff, by the name of *J S, knight*, be pleaded, and the record brought in be of outlawry of the plaintiff by the name of *J S, esq.*, this is a failure of record.

Bro. *Fail. of Record*, pl. 11.

If the record of outlawry brought in vary from the record of outlawry pleaded, as to the day of the *exigent*, this is a failure of record, the day of the return of the *exigent* being material.

Dyer, 187.

But if a record of one day of a term be pleaded, and a record of another day of the same term be brought in, this is not a failure of record ; because as a whole term is but one day in the eye of the law, the variance is not material.

Hob. 209, *Parry v. Paris*; Hardr. 200; ¶and see 10 Price, 154; 4 Barn. & A. 435.¶

If, however, the state of the pleadings be such, that the party who has pleaded a record ought to show the precise day of the term of which it is, and the record brought in be of a different day, this is a failure of record ; notwithstanding it be a record of the same term.

Bro. *Fail. of Record*, pl. 16.

The consequence of a failure of record is, that judgment is given against the party who pleaded the record.

Bro. *Fail. of Record*, pl. 2.

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[THE trial by certificate is allowed in such cases where the evidence of the person certifying is the only proper criterion of the point in dispute. For when the fact in question lies out of the province of the court, the judges must rely on the solemn averment or information of persons in such a station, as affords them the most clear and competent knowledge of the truth. As therefore such evidence (if given to a jury) must have been conclusive, the law, to save trouble and circuitry, permits the fact to be determined upon such certificate merely.

3 Bl. Comm. 333.] ¶See Com. Dig. tit. *Certificate*.¶

It is in the general true, that if a question arise in a temporal court, concerning a matter which is only triable in a spiritual court, it must be tried by the certificate of the ordinary.

And such question cannot be tried by the certificate of a deputy to the ordinary, unless the ordinary be out of the realm in the king's service.

8 Rep. 68, 69, *Trollop's case*; 1 Inst. 134; Bro. *Certif. de Evesque*, pl. 30.

But if a bishopric be vacant, a question which is triable only in the bishop's court may be tried by the certificate of the guardian of the spiritualities.

2 Roll. Abr. 590, (Z), pl. 2.

If a matter which is only triable in a spiritual court be pleaded in abatement of an action in a temporal court, it is not to be tried by the certificate of the ordinary ; because such trial would not in this case be peremptory.

Bro. *Certif. de Evesque*, pl. 22 ; 2 Roll. Abr. 588, pl. 3.

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The question, at what time an act which is only triable in a spiritual court was done, is not in the general to be tried by the certificate of the ordinary. But if the time of doing an act, which is only triable in a spiritual court, be material, such question is to be tried by the certificate of the ordinary.

2 Show. 53; Hill v. Boomer, Noy, 111.

If a question arise in a temporal court concerning special bastardy; namely, whether J S was born before his father and mother were married, it is not to be tried by the certificate of the ordinary; because the marriage being admitted, the question concerning the time of birth of J S may be properly tried in the temporal court.

Bro. Bast. pl. 17, pl. 29. [Besides, it would be highly improper to refer the trial of a question of special bastardy to the ordinary; who, whether the child be born before or after marriage, will be sure to certify him legitimate.]

It was formerly holden, that if a question arose in a temporal court concerning general bastardy; namely, whether the father and mother of J S were married, it was in the general to be tried by the certificate of the ordinary; because a question concerning the validity of a marriage can be only tried in a spiritual court.

Bro. Bast. pl. 9, pl. 17, pl. 29.

But it was at the same time holden, that if the question did not arise before the death of the person whose legitimacy was in question, it might be tried in a temporal court.

Bro. Bast. pl. 3, pl. 9.

And it has been for many years holden, that the question, whether there has been a marriage in fact, is in all cases triable in a temporal court; for that the certificate of the ordinary is never necessary, unless the question be whether the father and mother were lawfully married.

1 Show. 50, Allen v. Grey; Salk. 437.

It follows, that as the plea of *ne unques accouple in loyal matrimonie*, which is the only plea whereby the lawfulness of a marriage can be put in issue, is only to be pleaded in a real action, the certificate of the ordinary is not at this day necessary in a personal or mixed action.

Bro. Bast. pl. 9; Salk. 437; 1 Lev. 41.

||The lawfulness of a marriage celebrated in Scotland may be tried by a jury, for otherwise there would be a failure of justice, since there is no bishop to give a certificate; and therefore a replication to a plea of *ne unques accouple*, in a writ of dower alleging a marriage in Scotland, may conclude to the country. The demandant cannot reply to this plea a sentence in the spiritual court establishing her marriage: for the question must be tried by the bishop's certificate, and he is the judge how far that sentence is conclusive.

Ilderton v. Ilderton, 2 H. Black. R. 145, where see the learned judgment of Eyre, C. J.; and see Park on Dower, p. 13; 2 Will. Saund. 44 b, *notâ*; Robins v. Crutchley, 2 Wils. 118, 122.||

In action of debt upon a bond, conditioned for the payment of a sum of money to the plaintiff upon the day of his marriage, the defendant pleaded *ne unques loyalement marrie*. Issue being joined upon this plea, there was a verdict for the plaintiff. In arrest of judgment it was insisted, that the lawfulness of the marriage ought not to have been tried by a jury. But by the court—The material part of this issue is, married or not. The plain-

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tiff might have demurred to the defendant's plea, on account of the word *loyalement* being therein contained. As he did not demur but pleaded to issue, and as this is a personal action, wherein the lawfulness of a marriage cannot properly come in question, the trial was well enough.

1 Lev. 41, *Basset v. Morgan*; Bro. *Bast.* pl. 9; Salk. 437.

If a question arise in a temporal court, whether J S be under a sentence of excommunication, it is to be tried by the certificate of the ordinary.

1 Inst. 133.

If a question arise in a temporal court, whether J S be divorced from his wife, it is to be tried by the certificate of the ordinary.

Bro. *Trial*, pl. 31, pl. 53.

Wherever the certificate of the ordinary is necessary to the trial of a question in a temporal court, it is also necessary that the certificate be positive as to the fact certified; because the temporal court cannot determine upon any special matter therein contained.

Cro. Eliz. 789, *Baker v. Rogers*; 2 Roll. Abr. 591.

In an action of dower, issue was joined upon the plea of *ne unques accouple in loyal matrimonie*. The ordinary being written to by the court, he certified the evidence adduced before him to prove the lawfulness of the marriage; but he did not certify positively that the parties were lawfully married. Upon a motion as of course for judgment for the demandant, the court refused to give judgment; and said it might be moved upon notice of motion to the tenant, who would then have an opportunity of objecting to the sufficiency of the certificate. The certificate was afterwards amended by returning the fact instead of the evidence; and judgment was given for the demandant.

1 Barn. 1, *Easterly v. Easterly*.

But if the certificate be positive as to the fact certified, it is sufficient, notwithstanding the evidence upon which the ordinary founded his opinion be therein contained; inasmuch as this is to be rejected as surplusage.

Bro. *Bast.* pl. 35; 2 Roll. Abr. 591, pl. 4, pl. 6.

It is not necessary for the ordinary, who certifies that two parties were joined together in lawful matrimony, to mention the day or place of the marriage; because his certificate, provided it be positive as to the fact certified, is conclusive.

Cro. Car. 351, *Wickham v. Enfield*; 2 Roll. Abr. 591, pl. 3.

[*Ability* of a clerk presented, *admission*, *institution*, and *deprivation* of a clerk, shall be tried by certificate from the ordinary or metropolitan, because of these he is the most competent judge; but *induction* shall be tried by a jury, because it is a matter of public notoriety, and is likewise the corporal investiture of the temporal profits. *Resignation* of a benefice may be tried in either way; but it seems most properly to fall within the bishop's cognisance.

3 Bl. Comm. 336; 2 Inst. 632; Show. P. C. 88; 2 Roll. Abr. 583, &c.; Dy. 229.]
 ¶As to the bishop's certificate in cases of non-residence, see 54 G. 3, c. 54; Woolrych on Certificates, p. 15.¶

If a question arise concerning the existence of a custom of the city of London, it may in the general be tried by the certificate of the mayor and aldermen.(a)

1 Inst. 74; 2 Roll. Abr. 579, 580; [4 Burr. 2248.] ¶(a) In 30 Geo. 2, two customs were certified *ore tenus* in K. B., by the recorder, pursuant to writs of *certiorari*, directed

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to the mayor and aldermen. The recorder, after certifying, delivered in the writs of *certiorari*, and written copies of the returns which he had delivered by mouth, and the court ordered the *certiorari* to be filed, and the return recorded. It is said such an instance had not occurred in K. B. since Henry the Sixth's reign; and after consultation in the city, it was determined the recorder must certify in his purple cloth robe, faced with black velvet. *Plummer v. Bentham*, 1 Burr. 251; but see *Cro. Car.* 516, where the recorder certified a custom as to exercising certain trades without apprenticeship.]

But unless the party who desires to have a question concerning the existence of a custom of the city of London tried by certificate, surmise that when parties have been at issue concerning the existence of such a custom, it has been usual to try the issue by the certificate of the mayor and aldermen, the question is not to be so tried.

1 Inst. 74; Bro. *Trial*, pl. 96.

The certificate of the mayor and aldermen of the city of London, concerning the existence of a custom of the city, is not to be sent in writing, but is to be delivered at the bar of the court by the mouth of the recorder.

1 Inst. 74; 2 Roll. Abr. 579.

If a question arise, whether there be a custom of the city of London that every man may devise land lying therein, it may be tried by the certificate of the mayor and aldermen.

2 Roll. Abr. 580, pl. 5.

If in an action of debt upon bond the defendant plead a foreign attachment in London by virtue of a custom of this city, and issue be joined upon the existence of the custom, it may be tried by the certificate of the mayor and aldermen.

2 Roll. Abr. 580, pl. 3.

An action of debt was brought upon a by-law, which ordained that every person elected to the livery of a certain company should pay twenty-five pounds for the use of the company. The defendant pleaded a custom of the city of London, that no person is capable of being elected to the livery of any company unless he is a freeman of the city, and that he is not a freeman thereof. The plaintiff in his replication denied the existence of the custom, and concluded with an averment. The defendant demurred, because the plaintiff had not concluded to the country. It was holden, that the conclusion was right; for that the existence of the custom may be tried by the certificate of the mayor and aldermen.

Sir T. Jon. 149, *Leather Sel. Com. v. Beacon*.

||Where the custom has once been certified, the court must afterwards take judicial notice of it, and cannot have it certified over again.

Blacquiere v. Hawkins, Doug. 379.||

But if the mayor and aldermen are interested in the custom concerning the existence of which the question arises, it is to be tried by a jury.

Hob. 85, *Day v. Savage*.

In an action of trespass for taking the plaintiff's goods, the defendant pleaded a custom of the city of London, that if any person, not having a shop in the city, carry goods about the same to sell, he shall forfeit the goods to the mayor, citizens, and commonalty; and that it shall be lawful for any freeman to seize them for the use of the mayor, citizens, and commonalty; and that he, being a freeman, did seize them by virtue of the custom. Issue being joined upon the existence of the custom, it was tried by the certificate of the mayor and aldermen. The trial was adjudged a mis-trial, and the issue was afterwards tried by a jury. And by the court:

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The existence of a custom in which the mayor and aldermen of London are interested is not fit to be tried by their certificate, for no man ought to be a judge in his own cause.

2 Roll. Abr. 581, pl. 3.

The defendant in an action pleaded that the mayor, citizens, and commonalty of the city of London were entitled to a certain sum of money for wharfage, from the owner of every boat brought into Queenhithe. The plaintiff replied that every freeman was, by a custom of the city, exempted from the payment of the wharfage. Issue being joined upon the existence of the custom, it was holden, after argument and long debate, that the issue ought not to be tried by the certificate of the mayor and aldermen, because they are interested in the question, but by a jury.

Moor, 871, Day v. Savage; 2 Roll. Abr. 579, pl. 2.

[In some cases the certificate of the sheriffs of London shall be a final trial; as if the issue be, whether the defendant be a citizen of London or a foreigner, in case of privilege pleaded to be sued only in the city courts. Of a nature somewhat similar to which is the trial of privilege of the university, when the chancellor claims cognisance of the cause, because one of the parties is a privileged person. In this case, the charters, confirmed by act of parliament, direct the trial of the question, whether a privileged person or no, to be determined by the certificate and notification of the chancellor under seal; to which it hath also been usual to add an *affidavit* of the fact: but if the parties be at issue between themselves, whether A is a member of the university or no, on a plea of privilege, the trial shall be then by jury, and not by the chancellor's certificate; because the charters direct only that the privilege be allowed on the chancellor's certificate, when the claim of cognisance is made by him, and not where the defendant himself pleads the privilege; so that this must be left to the ordinary course of determination.

Co. Lit. 74 a; 3 Bl. Comm. 334, 335.

If in order to avoid an outlawry, or the like, it was alleged, that the defendant was in prison, *ultra mare*, at Bordeaux, or in the service of the mayor of Bourdeaux, this should have been tried by the certificate of the mayor; and the like of the captain of Calais. But when this was law, those towns were under the dominion of the crown of England. And, therefore, by a parity of reason, it should now hold, that in similar cases, arising at Jamaica or Barbadoes, the trial should be by certificate from the governor of those islands.

9 Rep. 31; Co. Lit. 74 a; 3 Bl. Comm. 334.

The certificate of the queen's messenger, sent to summon home a peeress of the realm, was formerly held a sufficient trial of the contempt in refusing to obey such summons.

Dy. 176, 177.

If there be any question respecting the practice of the courts in Wales, it shall be determined by certificate from the judges there.

Broughton v. Randall, Cro. Eliz. 503.

So the courts will inform themselves whether a highway (indicted) is in repair, by certificate from the justices of the peace.

Rex v. Mawbey, 6 Term R.] ||See 5 Taunt. 634.||

If a question arise whether an original writ ought to bear *teste* on the

(D) Of a Trial by a Jury.

day it was bespoken at the cursitor's office, or upon the day it was sealed, it is to be tried by the certificate of the principal and assistants of the cursitor's office.

1 P. Wms. 438, *Price v. The Hundred of Chewton*.

(D) Of a Trial by a Jury.

§ THE amendment to the Constitution of the United States, by which the trial by jury is secured, embraces all suits which are not of equity or admiralty jurisdiction, whatever may be the form which they may assume to settle legal rights.

Parsons v. Bedford, 3 Peters, 433.

When a jury is required to try a cause, the legislature of the state cannot reduce the number of jurors required by common law, which defines a jury to be a body of twelve men.

Bonaparte v. The Camden and Amboy Railroad Company, Baldw. 222. See *Baker v. Biddle*, Baldw. 404.

It is in the general true, that every question of fact arising in a cause is to be tried by a jury.

¶ As to the origin and progress of trial by jury, see Reeve's Hist. Engl. Law, p. 1, c. 1; Amos's note to Fortescue de Land. c. xx., and the works there cited. Hallam's Midd. Ages, ch. 8.

And in divers cases wherein a question of fact may be otherwise tried, it is, as under the foregoing heads has been shown, in the discretion of the court to send it to be tried by a jury.

Bro. *Trial*, pl. 60; Bro. *Appeal*, pl. 47.

If a new offence be created by a statute, and the statute be silent as to the manner of its being tried, the trial thereof is to be by a jury; this manner of trial being agreeable to *Magna Charta*.

7 Mod. 99, Reg. v. *Sturmey*.

As the question, whether there ought to be a common council in a corporation, consisting of a certain number of persons, must always depend upon a question of fact, viz., whether there have been an usage in the corporation to have such common council, it is a proper question for the determination of a jury.

Sayer, 37, Rex v. The Mayor and Burgesses of Nottingham.

If a question do not depend upon an act alone, but upon an act as being coupled with a certain intent, the intent as well as the act must be tried by a jury; because the intent is in such case the material thing, and the jury must judge thereof in the best manner they are able from the circumstances which attended the act.

1 H. H. P. C. 229.

If the issue be, whether a tenant chased his beasts from a manor, after the lord who came to distrain had seen them upon the manor, with an intent to prevent them from being distrained, the intent must be tried by a jury.

Bro. *Issue*, pl. 45.

If the issue in an information be, whether the intent of the defendant was to carry wool, which had been by him put on board a ship, to Calais, the intent must be tried by a jury.

Bro. *Issue*, pl. 22; 1 H. H. P. C. 229.

(D) Of a Trial by a Jury.

If an agreement be that a certain fact shall be proved, it must be proved to a jury; this being the legal way of proving a matter of fact.

Hob. 217, Crookhay v. Woodward; Hob. 93; 5 Rep. 108; Sid. 313; Cro. Ja. 381.

But if a particular manner of proving a certain fact have been agreed upon, it must be proved in the manner agreed upon.

Hob. 217, Crookhay v. Woodward; 5 Rep. 108; Sid. 313; Hob. 93.

If an agreement be that a certain fact shall be proved before J S, it is to be proved by witnesses to be examined by J S.

3 Lev. 241, Beayne v. Beale.

And although an agreement be in general terms that a certain fact shall be proved, yet if it appear clearly from any circumstance attending the agreement that the parties did not intend a proof to a jury, the fact may be otherwise proved.

Cro. Ja. 381; Sid. 313.

If an agreement be, that a certain fact shall be proved in two days, it is not necessary that it should be proved to a jury; for, as a trial by a jury can never be had within so short a space of time as two days, such trial could not have been intended.

Cro. Ja. 381, Gold v. Death.

The condition of a bond dated the 23d day of August was, that the obligor should pay to the obligee ten shillings for every twenty shillings which the obligee should by sufficient proof make appear that J S was indebted to him; and that one half of the same should be paid on or before the 25th day of November then next ensuing. An action of debt being brought upon the bond, the defendant pleaded, that the plaintiff did not make it appear by sufficient proof that J S was indebted to him in the sum of twenty shillings. The plaintiff replied, that before the said 25th day of November he and J S settled an account, by which J S acknowledged himself to be indebted to the plaintiff in the sum of 310*l*. Upon a demurrer to the replication, it was insisted that the proof of the debt ought to have been made to a jury; but it was holden, that such proof could not have been intended, because a trial by a jury could not have been had before the time limited for the payment of the money must have expired.

Lutw. 665, Ladd v. Garrod.

If it be necessary that a fact should be proved to a jury, it is not necessary that it should be proved in a previous action.

A promise was made by J S to pay J N three pounds, upon his proving that a certain cock won his battle. An action being brought for the money, J S pleaded that this had not been proved. The plea was holden to be bad. And by the court—It was not necessary to prove this before the bringing of the present action; for it may be proved at the trial thereof.

Moor, 845, Griffin's case; 2 Leon. 215.

A penalty was given by a statute, upon its being proved by two witnesses that a certain thing thereby prohibited had been done. In an action of debt for the penalty, the question was, whether it were necessary to prove the offence by two witnesses, in a previous action, before an action could be brought upon the statute. It was holden not to be necessary; for that this may be proved in the action upon the statute.

Cro. Ja. 188, Aldred v. Mathew.

(E) Of a Trial at Bar.

By the statute of second Westminster, c. 30, trials at bar, which were before had in all causes, are confined to such causes as by reason of the greatness and variety of the matters in question require a more solemn examination.

A trial at bar cannot be had without the leave of the court, although both parties desire to have a cause tried at bar.

2 Lill. Abr. 741; Stra. 696.

It is laid down in one book, that unless it appear that the matter in question is of considerable value, and that some difficult question will probably arise at the trial of the cause, the court ought not to grant a trial at bar.

1 Barnard. 141, *Goodright v. Wood*.

The estate in question was of the value of 3000*l.* a year; yet the court refused to let an action of ejectment be tried at bar; because as the lessor of the plaintiff claimed under the defendant, it did not appear that any thing more would be necessary than to prove the execution of a conveyance.

Salk. 648, Lord Sandwich's case.

But it is in other books laid down, that the granting of a trial at bar is discretionary in the court.

2 Lill. Abr. 741; Stra. 696; [1 Term R. 363.]

Trials at bar were granted in two modern cases, although it did not appear that any difficult question would arise at the trial of either of the causes, because the matters in question were of great value.

Stra. 52, 479.

In another case the court granted a trial at bar at the instance of the defendant; because the plaintiff had laid his damages at 50,000*l.*, although it did not appear that any difficult questions would arise at the trial of the cause.

1 Barn. 320, Lord Hillsborough *v. Jefferies*.

And in another case the court granted a trial at bar, although the matter in question was very inconsiderable; because it appeared that the examination would be difficult.

Stra. 644, *Rex v. Johnson*.

It has been holden, that in order to induce the court to grant a trial at bar the particular value or difficulty of the cause must be shown; for that it is not enough to swear generally to value or difficulty.

1 Barnard. 141, *Goodright v. Wood*.

It was sworn, in order to obtain a trial at bar, that the examination was expected to be long and difficult, and that the matter in question was of great value. A trial at bar was refused. And by the court—It is very easy to allege generally that there is value in a cause, or that the examination is expected to be long and difficult: but the court ought not to grant a trial at bar unless the particular value or difficulty be shown; because trials at bar are very expensive, and the granting of many would prevent the court from despatching the business of other suitors.

Sayer, 79, *Rex v. Burgesses of Carmarthen*.

||So in a late cause concerning extensive rights of chase, involving difficult questions of boundary, and documentary evidence of great length and antiquity, together with much oral testimony, the Court of C. B. refused a trial at bar, principally on the ground, that in another case where another

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defendant had contested precisely the same rights, and obtained a verdict against the plaintiff, the Court of King's Bench had recently refused a new trial.

Lord Rivers v. Pratt, 1 Bro. & B. 265.¶

It was said by Pratt, C. J., that the most proper case for granting a trial at bar is, where it is likely that a question of law will arise, and that this will be so complicated with a question of fact, that the whole matter must be determined by the jury under the direction of the court: for that, how difficult soever the question of law which is likely to arise may appear to be, if it be not complicated with a question of fact there is no necessity to grant a trial at bar; because the question of law may be reserved for the consideration of the court.

MS. Rep. Whitaker v. Burrough, Trin. 4 G. 3, in C. B.

It is in the general true, that the court will not grant a trial at bar before an issue is joined; because the court cannot judge, before it is known what the issue is, of the propriety of trying it at bar.

Stra. 696, The case of the Borough of Christ Church; 12 Mod. 331.

But in an action of ejectment the court will grant a trial at bar before issue is joined; otherwise it would generally be in the defendant's power to prevent the plaintiff from moving for a trial at bar, issue being seldom joined in such action until the opportunity of moving for a trial at bar is past.

Roe v. Doe, on the demise of Cholmondly, Barn. 455.

A motion being made for a trial at bar, before issue was joined in the action, the court refused to make a rule to show cause. And by Ryder, C. J.—It is contrary to the practice of the court to grant a trial at bar in any action, except an action of ejectment before issue is joined.

Sayer, 155, Anon.

If the *venue* in an action be laid in London, the court cannot order it to be tried at bar; because the doing of this would be contrary to a charter, by which the citizens of London are exempted from serving as jurors out of the city of London.

Salk. 644; 2 Lill. Abr. 741; Stra. 856. [The court may order it in this case, if the jurors consent to waive their privilege as citizens, 2 Wils. 136, or the parties consent to have the cause tried by a Middlesex jury. Doug. 438.]

And it is said, that if the *venue* in an action be laid in Bristol, the court cannot, for the same reason, order it to be tried at bar.

2 Lill. Abr. 750.

If a civil cause be carried on in the name of the king, it must always be tried at bar, unless there be a special warrant for granting a writ of *nisi prius*; because the statute of *nisi prius* does not extend to the king.

2 Roll. Abr. 629; Fitz. N. 241.

The attorney-general may pray a trial at bar in any civil cause wherein the king is interested; for, as the statute of *nisi prius* does not extend to him, the king has a right to try every civil cause in which he is interested at bar.

Bro. *Nisi Prius*, pl. 35; 2 Inst. 424; Salk. 651; ¶Rowe v. Brenton, 8 Barn. & C. 737, acc.¶

A trial at bar was granted at the prayer of the attorney-general in an action against the governor of New York, for something done by him as governor; because the action was defended at the expense of the king.

Salk. 625, Lord Bellamont's case.

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The attorney-general cannot prevent the trial of a civil cause in which the king is interested at bar; for although he may, if the king be interested in a civil cause, always pray a trial at bar, it does by no means follow that he should have a power to deprive a subject of the right of trying a cause at bar, which is proper to be tried there.

Salk. 651, Sir Samuel Astry's case.

The court will not in the case of an indictment or information grant a trial at bar at the prayer of the attorney-general, unless the prosecution be carried on at the expense of the crown; for if the prosecution be carried on at the expense of a subject, the king is not to be considered as concerned in point of interest, notwithstanding the prosecution is carried on in his name.

1 Ventr. 74, Anon.

The attorney-general prayed, that an information for perjury filed by him *ex officio* might be tried at bar: but the court refused to grant such trial; because he did not allege, that the prosecution was carried on at the expense of the crown. And by the court—As this does not appear to be the case, the usual requisites for a trial at bar must be laid before the court by affidavit. The attorney-general, having afterwards received orders from the king to prosecute, did at another day again pray a trial at bar; which was granted.

Stra. 816, Rex v. Hales.

The Court of King's Bench may grant a trial at bar in an information for a misdemeanor at the prayer of the defendant.

Stra. 52, Rex v. Toley.

A person of good character being apprehended by a hundred for a robbery, and there being reason to suspect that the prosecution would be carried on with great rigour, for the sake of discharging the hundred by his conviction, a trial at bar was moved for. It was not granted in this case, because the motion was made before a bill of indictment was found: but it was said by Holt, C. J., that it had been usual to grant a trial at bar in an indictment at the prayer of the defendant.

12 Mod. 331, Rex v. Thompson.

The Court of King's Bench may grant a *habeas corpus* for bringing a felon to be tried at bar, although the felony was not committed in the county of Middlesex, if it appear that there will not be a jail delivery at the usual time in the county in which the felony was committed.

2 Lill. Abr. 746.

It is said, that an action of debt for not setting out tithes being brought by Sir William Morton, one of the justices of the Court of Common Pleas, a trial at bar was moved for, which was granted without any affidavit. And by the court—If one of the judges or a master in Chancery be a party, the cause, however small the value of the matter in question is, may at the prayer of such party be tried at bar.

1 Sid. 407, Morton v. Hopkins.

In another case it is said, that a trial at bar is never refused, if it be prayed by an officer of the court, or a gentleman at the bar, who is a party to the suit.

Salk. 651, Sir Samuel Astry's case.

But it is doubtful whether either of these cases be at this day law; for

(F) Of a Trial at *Nisi Prius*.

in a very late case, in which a trial at bar was moved for by the defendant, a serjeant at law, his pretension to a trial at bar on account of being a serjeant at law was not much relied upon, and a trial at bar was granted upon another ground.

MS. Rep. Whitaker v. Burrough, Trin. 4 G. 3, in C. B.

The court may grant a trial at bar at the instance of a person who sues *in forma pauperis*.

12 Mod. 318, Anon.

A trial at bar being moved for by the defendant, it was refused, because the plaintiff was poor; unless the defendant would consent to take *nisi prius* costs, in case he should obtain a verdict.

Salk. 648, Anon. [Vide Doug. 437, 438, *acc.*]

The court will not grant a trial at bar in an action of ejectment, unless a plaintiff sufficient to answer for costs be named.

12 Mod. 318, Sherwin v. Sir Thomas Clarges.

A trial at bar was refused, because the party moving for it had not paid the costs of a former trial, at which there was a verdict against her.

1 Ventr. 64, Lady Baltinglass's case.

A motion being made, that a cause might be tried at bar in the same term it was moved for, upon a suggestion that the defendant would the next term be entitled to privilege, it was objected, that it had not been usual to grant a trial at bar in the term it was moved for. (a) The court doubted, and ordered precedents to be looked into: but the defendant agreeing afterwards to waive his privilege, a rule was made for a trial at bar in the next term.

Rep. of Pr. in C. B. 66, Edwards v. The Earl of Warwick. [(a) 2 Salk. 649.]

It is a general rule not to grant a trial at bar in an issuable term, lest the other business of the court should on account of such trial be postponed.

Lill. Abr. 742; [1 H. Bl. 206.]

But upon the particular circumstances of a case the court will grant a trial at bar in an issuable term.

1 Barnard. 370; 2 Lill. Abr. 742. ¶The case of Goodtitle v. Braham was tried at bar in Hilary Term, 32 G. 3, 4 Term R. 497.¶

By an ancient rule of all the courts, every cause to be tried at bar is to be tried at least fourteen days before the end of a term, that the courts may be at liberty towards the end of the term to proceed upon matters of law, which are the more proper business of the courts.

2 Lil. Abr. 742.

(F) Of a Trial at *Nisi Prius*.

THE writ of *nisi prius* is so called from the words, *nisi prius talis et talis venerint*, which are therein contained.

This writ is given by the statute of second Westminster, c. 30, for the sake of delivering parties from the great trouble and expense of trying their causes at bar.

The writ of *nisi prius* ought not to be issued before the *venire facias* is returned; for until this is returned the names of the jurors are not of record.

Bro. *Nisi Prius*, pl. 1, pl. 9.

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(F) Of a Trial at *Nisi Prius*.

But a writ of *nisi prius* issued upon the day of the return of the *venire facias* was holden to be well enough; although it did not appear that the *venire facias* was in fact returned before the writ of *nisi prius* was issued.

Bro. *Nisi Prius*, pl. 9.

It is in the general true, that the defendant in an action is not entitled to a writ of *nisi prius*, unless the plaintiff have made default in proceeding to trial.

But in an action of replevin or *quare impedit*, in both which actions the defendant is an actor, he may sue out a writ of *nisi prius*, although the plaintiff have not made default in proceeding to trial.

Bro. *Nisi Prius*, pl. 40.

||By the statute Westm. 2, (13 Edw. 1,) c. 30, the clause of *nisi prius* was directed to be inserted in the *venire facias*, and at first the trial was had upon that writ, as it is still in case of trial at bar. This practice was attended with many inconveniences; for, in the first place, the jury were not obliged to attend under any penalty on the day of *nisi prius*, and if they did attend, the defendant might have cast an essoin, and so the jury, after much trouble and expense, were obliged to return, leaving the cause untried. Another inconvenience was, that the parties, not seeing the panel beforehand, could not be prepared to make their challenges. To obviate this latter inconvenience, it was enacted by stat. 42 Edw. 3, c. 11, "that no inquests, except of assize and jail delivery, shall be taken by writ of *nisi prius* or otherwise, at the suit of any one, before the names of all them that shall pass in the inquests shall be returned in court." From thenceforward the clause of *nisi prius* could not be inserted in the *venire facias*, as was directed by that statute Westm. 2, and therefore it was taken out of that writ and placed in the *distringas* or *habeas corpora*, as the practice continues to this day.

Tidd's Prac. 819, and cases there cited; where see further as to the jury-process, and trial at *nisi prius*.||

It has been holden, that the defendant in a writ of error may sue out a writ of *nisi prius*, in case issue be joined upon an error in fact, although the plaintiff have not made default in proceeding to trial: for that, if this could not be done, the effect of the judgment in the original action might be delayed by the plaintiff in error.

2 Lev. 5, Dennis v. Dennis.

If both parties desire it, a cause which is proper to be tried at bar may be tried at *nisi prius*; for in that part of the statute, describing causes which may be tried at bar, it is declared, that if both parties desire it, any one of these may be tried at *nisi prius*.

An action of appeal may be tried at *nisi prius*.

Bro. *Nisi Prius*, pl. 19; 2 Hawk. P. C. c. 42, § 2.

If the plaintiff in a country cause have neglected to try it at the next assizes after issue was joined, the defendant may sue out a writ of *nisi prius* with proviso.

Gilb. Hist. C. P. 91.

It is said that the defendant in a town cause cannot sue out a writ of *nisi prius* with proviso; unless the plaintiff have neglected to proceed to trial for the space of one whole term after issue was joined.

Gilb. Hist. C. P. 91.

(F) Of a Trial at *Nisi Prius*.

But it has been holden, that the defendant in a town cause may sue out a writ of *nisi prius* with proviso, as soon as the plaintiff has been guilty of one default in proceeding to trial after issue was joined.

Rep. of Pr. in C. B. 101, Williams v. Jones.

The defendant may sue out a writ of *nisi prius* with proviso in an action of appeal; whether it be brought for a capital offence or for one that is not so.

2 Hawk. P. C. c. 42.

And it is said in one case, that the defendant in an indictment may sue out a writ of *nisi prius* with proviso.

1 Sid. 316, Anon.; 1 Ventr. 315, Anon.

But it seems to be the better opinion that the defendant cannot in any cause, either civil or criminal, in which the king is a party, sue out a writ of *nisi prius* with proviso; because a default cannot be imputed to the king.

2 Hawk. P. C. c. 42.

And it has been doubted whether the defendant, in an information *qui tam*, can sue out a writ of *nisi prius* with proviso; because the king is *quasi* a party.

2 Leon. 110, Knevit v. Taylor.

If two writs of *nisi prius*, with proviso, one of which was sued out by the plaintiff, the other by the defendant, come to the hands of the sheriff, it is in his option to return which he pleases.

Bro. *Proces*, pl. 56; 2 Roll. Abr. 666. ||Vide as to trial by proviso, Tidd's *Prac.* 802, 803, 804, (7th ed.)||

||Anciently, it seems, all causes in Middlesex were tried at bar; but this, from the increase of business, having been found extremely inconvenient, it was enacted by the statute 18.Eliz. c. 12, "that the Chief Justice of England, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, or, in their absence, two puisne judges of their respective courts, within term time, or four days next after the end of every term, might try, in Westminster Hall, all manner of issues which ought to be tried in any of the said courts, by an inquest of the said county of Middlesex; and that commissions and writs of *nisi prius* should be awarded in such cases as had been used in any other shire of the realm."

Two puisne judges were required to sit at *nisi prius*, in Middlesex, in the absence of the Chief Justices or Chief Baron, till the statute 12 Geo. 1, c. 31, by which it was provided, that any one judge of the several courts of record at Westminster Hall might try causes in the manner prescribed by 18 Eliz. c. 12, and the time was extended to the space of eight days after the end of every term. By a subsequent statute,(a) this time was still further extended to fourteen days. And by the statute 1 Geo. 4, c. 55, § 1, causes may be tried in Middlesex at any time during the vacation. Trials may be had also in that county, either in Westminster Hall, or with the consent of his majesty, signified under his sign manual, in any other fit place in the city of Westminster.(b)

(a) 24 G. 2, c. 18, § 5. (b) Stat. 1 G. 4, c. 21; and see the statute 3 G. 4, c. 87, for enabling his majesty's Court of Exchequer to sit; and the Lord Chief Baron, or any other baron of the said court, to try Middlesex issues elsewhere than in the place where the Court of Exchequer is commonly held in that county, during the period of rebuilding the said court.

(G) Of Notice of Trial.

In London, trials at *nisi prius* take place by immemorial custom, and the judges sit at Guildhall when and as long as the exigency of business requires. And by statute 1 Geo. 4, c. 55, § 2, for giving further facilities to the proceedings in the Court of King's Bench, any one of the judges is authorized, at the request of the Chief Justice, to try causes at *nisi prius* at the same time as the Chief Justice. So that two causes may be proceeded in at the same time. This statute has fallen into disuse, the proceeding being found inconvenient.

3 Camp. 42, n.

(G) Of Notice of Trial.

It is in one case said that notice of trial, which must be in writing, cannot be given in the country.

Goodright v. Hoblin, Barnes, 298.

But in a subsequent case the following distinction is taken, that if notice of trial be given with the issue, it must be given in town, because the issue can only be delivered in town: but that if notice of trial be not given with the issue, it may be given in the country.

Tashburne v. Havelock, Barnes, 306.

Eight days' notice of trial are sufficient, if the cause is to be tried in London or Westminster, and the defendant do not reside above forty miles from these cities respectively.

By the 14 Geo. 2, c. 17, § 4, it is enacted, "That no indictment, information, or cause whatsoever, shall be tried before any judge of assize or *nisi prius*, or at any sitting in London or Westminster, where the defendant resides above forty miles from the said cities respectively, unless notice of trial in writing has been given at least ten days before such intended trial."

Before the making of this statute the practice of the courts was to give fourteen days' notice of trial, if the cause were to be tried in London or Westminster, and the defendant resided above forty miles from those cities respectively; and it has been holden, that as the words of this statute are not in the negative, namely, that no more than ten days' notice shall be given, the practice of the courts, which is the law of the courts, is not taken away; and, consequently, that fourteen days' notice are in such case still necessary.

Bowler v. Jenkin, Barnes, 305.

[Although the venue be laid in London, and the defendant be arrested there, yet, if his residence be above forty miles from town, the notice required by the statute and the practice of the court must be given.

Brind v. Torris, 2 Bl. R. 1205; Douglas v. Ray, 4 Term R. 552; {1 East, 688, Spencer v. Hall.}

But if one of several defendants reside within forty miles of London, so long a notice is not necessary.

Per Ashhurst, J., 4 Term R. 519, 520.]

||And where a defendant, residing in town at the issuing of the writ, changes his residence permanently to the country at the distance of above forty miles from town before the delivery of the issue, he is entitled to fourteen days' notice of trial. And the like notice is required where the defendant usually resides abroad, and has no settled habitation in this country. Where the defendant, being a practising attorney, has chambers in one of the Inns of Court, and a house above forty miles from London, or where he has a permanent residence in town, from which his absence is merely

(G) Of Notice of Trial.

occasional or temporary, eight days' notice of trial is sufficient. So in the Exchequer it is a rule, that in all cases where the venue is laid in the country, and a term's notice is not necessary, ten days' notice of trial, exclusive of the day it is given, shall be deemed sufficient notice; but if the venue be laid in London or Middlesex, and the defendant reside above forty miles from London, then the plaintiff shall give fourteen days' notice of trial, exclusive of the day it is given, unless a baron shall think fit to order otherwise.

Tidd's Prac. 755, (9th ed.)||

[Where issue is joined early enough in a term, notice of trial must be given in the same term.

Frampton v. Payne, 1 H. Bl. 65;] ||Tidd's Prac. 807, (7th ed.)||

Notice cannot be given of a trial at bar until the day appointed for the trial be entered in the book of the clerk of the papers.

2 Lill. Abr. 741.

By the ancient rules of the Courts of King's Bench and Common Pleas, a whole term's notice is necessary to be given, before there can be any proceeding in a cause wherein there has been no proceeding for the space of four terms.

Some doubts have arisen concerning the construction of these rules; it is by a rule of the Court of Common Pleas of Easter, 13 Geo. 2, ordered, "That in every cause wherein there has been no proceeding for four terms, exclusive of the term in which the last proceeding was, the party who desires to proceed again shall give a term's notice to the other party of such proceeding; that such notice shall be given before the essoign-day of the fifth or other subsequent term; that a judge's summons, if no order has been made thereupon, shall not be deemed a proceeding; but that notice of trial, although it was afterwards countermanded, shall be deemed a proceeding within the meaning of this rule."

||But a judge's order, or notice that plaintiff will proceed in the cause which has not been acted under, is such a proceeding as to prevent the necessity of a term's notice. The rule does not extend to trials by proviso, or a motion for judgment as in case of a nonsuit.

Tidd's Prac. 798, (7th ed.)

It has been holden, that although a cause have been at issue more than four terms, if the trial have been delayed by reason of privilege of parliament, it is not necessary to give a whole term's notice of trial.

1 Sid. 92, Powis's case.

It has been also holden, that if the trial of a cause, which has been at issue above four terms, have been delayed part of the time by an injunction from a court of equity, it is not necessary to give a whole term's notice of trial.

1 Sid. 92, Powis's case; [Hayley v. Riley, Dougl. 71, 72.]

{And if, within the year, the plaintiff gives notice that he shall proceed again, the common notice of trial is sufficient.

3 East, 1, Richards v. Harris.}

If notice of trial have been countermanded, it cannot afterwards be continued; but new notice must be given.

Barn. 301, Smith v. Hoff.

If the name of the cause be not inserted in the notice of trial, the notice

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is not good ; and this defect is not cured by inserting the name in the continuance of the notice.

Barn. 297, Jacob v. Marsh.

Notice of trial can be continued only once ; for the court will not suffer this, which amounts to giving short notice of trial, to be done a second time.

Barn. 292, Boyes v. Twist ; [2 Str. 1119, Green v. Giffard, S. P.]

But if the full time required for new notice of trial be given in a second notice of continuance, this is good as a new notice of trial ; for the court will reject the words of continuance as surplusage.

Barn. 292, Boyes v. Twist.

If a cause be made a remanet *pro defectu juratorum*, new notice of trial must be given.

2 Lill. Abr. 744.

It is said, that if a cause were made a remanet by the judge, because there was not time to try it, there is no necessity to give a new notice of trial ; for that the defendant is in such case bound at his peril to attend until the cause is tried.

2 Lill. Abr. 745.

||Where a cause is a remanet, no new notice of trial is ever given in London or Middlesex ; for defendant is bound to attend till the cause is tried ; and where a cause is made a remanet to the next sittings by order of *nisi prius*, no fresh notice of trial is requisite. But if the trial is put off by order of court, there must be a fresh notice, which also seems requisite after the cause is made a remanet at the assizes.

Tidd's Prac. 758, (9th ed.)||

[Although the plaintiff has undertaken peremptorily to proceed to trial at the next assizes, yet the defendant is not bound to attend and be prepared with witnesses, &c., without having had notice of trial. Nor will he be allowed the costs of such attendance and preparation, though he obtain judgment as in case of a nonsuit, on account of the plaintiff's not proceeding to trial.

Ifield v. Weeks, 1 H. Bl. 222.]

If the defendant proceed to trial of a cause under a writ of *nisi prius* with proviso, he is liable to the same rules, as to the giving notice of trial, as the plaintiff would have been.

Rep. of Pr. in C. P. 125, Swall v. Leaver.

It has been holden, that although the defendant, who has removed an indictment, be obliged by the recognisance entered into upon removing it, to try the issue which shall be joined at the next assize, he must give notice of trial : and that entering notice in the office-book is not sufficient notice.

Sayer, 90, Rex v. Furser.

Notice of countermanding a trial, which must be in writing, may be given in the country.

Barn. 298 ; Tidd's Prac. 757, (9th ed.)

It was heretofore sufficient to give two days' notice of countermanding the trial of a cause which was to be tried at a sitting in London or Westminster.

Rule of K. B. Mich. 4 Ann.

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It was also heretofore sufficient to give two days' notice of countermanding the trial of a cause which was to be tried at an assize, unless the notice were delivered to the agent in town ; in which case four days' notice was necessary.

Barn. 305, *Stafford v. Thompson*.

By the 14 G. 2, c. 17, § 5, it is enacted, "That where any party shall have given notice of the trial of any cause before any judge of assize or *nisi prius*, or at any sitting in London or Westminster, where the defendant lives above forty miles from the said cities respectively, and shall not afterwards countermand the same in writing six days at the least before such intended trial, every such party shall be obliged to pay the like costs and charges as if such notice of trial had not been countermanded."

||Tidd's Prac. 799, (7th ed.)||

[Where *short* notice of trial is to be accepted in country causes, it is the rule of the Court of King's Bench that such notice shall be given at least four days before the commission-day, one day exclusive, and the other day inclusive. But in town causes, two days' notice seems sufficient in such case ; but it is usual to give as much more as the time will admit. And Sunday is to be accounted a day in these notices, unless it be the day on which the notice is given.

Reg. Gen. 3 Term R. 660 ; Tidd's Prac. 757, (9th ed.)

{If the notice is for the right day of the month, it is good, though the day of the week mentioned be wrong. The latter will be rejected as surplusage ; if it appears that the defendant was not misled.

3 Bos. & Pul. 1, *Batten v. Harrison* ; 3 Cain. 86, *Wolf v. Horton*.}

β Where notice of trial is countermanded, the record need not be resealed, unless the alteration is made to a day after the return of the writ.

Chandler v. Besward, 2 Mees. & W. 206.

If the plaintiff avails himself of short notice of trial, he has no power to countermand, and must pay the costs of not proceeding to trial up to the time of countermand.

Doncaster v. Cardwell, 2 Mees. & W. 390 ; 5 Dowl. 581.

If a case has been continued by consent, from term to term, the parties must be ready to try at any term, and notice of trial is not required.

King of Spain v. Oliver, 1 Pet. C. C. 217.

Notice of trial may be given to the defendant in ejectment ; it is not requisite that it should be given to the landlord.

Clayton v. Alshouse, 2 Dall. 150.γ

(H) Of putting off a Trial.

THE trial of an indictment was proceeded to, notwithstanding an order under the sign manual to the clerk of the crown to enter a *cesser* of prosecution. And by the court—We are not to delay a cause by reason of the great or little seal.

1 Ventr. 33, *Rex v. Benson*.

A motion being made, at the instance of the defendant, to put off the trial of an indictment for a misdemeanor on account of the absence of a material witness, it was insisted, that the trial ought not to be put off,

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because the prosecution was carried on at the expense of the crown ; but the court, without hesitation, made a rule for putting it off.

MS. R. *Rex v. Stuart*, Trin. 33 G. 2 ; {1 Dall. 9, *The King v. Rapp* ; 1 Mass. T. Rep. 6, *Commonwealth v. Millard*.}

¶ It is not sufficient ground, in a capital case, to put off a trial, to enable the defendant to procure papers from a foreign country ; since the court cannot issue process which will be efficient in procuring them.

United States v. Gibert, 2 Sumn. 19.

The rule as to putting off a trial for the absence of witnesses, is the same in both civil and criminal cases.

The People v. Varmilyea, 7 Cowen, 369.

Where the witness was unable to attend, it was held sufficient cause for putting off the trial ; substituting an examination of witnesses on interrogatories for their personal attendance might prejudice the defendant's rights.

Hooker v. Rogers, 6 Cowen, 577.g

¶ The Court of King's Bench, upon application of the defendant, postponed the trial of an information for a misdemeanor upon the defendant's consenting, by writing under his own hand, to the examination upon interrogatories of a witness for the crown.

Rex v. Morphew, 2 Maul. & S. 602.

So, that court put off a trial to enable the defendant to apply for a commission for examining witnesses abroad on interrogatories, in order to support pleas of justification to a declaration for libel, where it appeared that the plaintiff had not promptly brought an action after the publication of the libel, and had been otherwise dilatory in bringing the cause to issue.

Macaulay v. Thorpe, 1 Chit. R. 685.

But the court will not put off a trial at the instance of the defendant, on account of the absence of a material witness, after he has pleaded a sham plea by which a trial has been lost, unless he will pay the money into court ; nor if he has conducted himself unfairly, or been the cause of any improper delay.

Saunders v. Pittman, 1 Bos. & P. 33 ; and see *Tidd's Prac.* 770, (9th ed.)

In an action by an administrator, a motion was made to put off the trial, until a suit in a spiritual court concerning the right of the plaintiff to be administrator should be determined. The motion was refused. And by the court—A court of common law cannot take notice of a proceeding in an ecclesiastical court.

Salk. 646, *Salisbury v. Proctor*, *Salk.* 649. [*Qu.*]

A motion was made to put off a trial ; because the costs for not proceeding to trial of the same cause had not been paid. At first the court said that the application ought to have been for an attachment for nonpayment of the costs ; but it appearing that an attachment would answer no purpose, the plaintiff being already in custody, a rule was made for putting off the trial.

1 Barnard. 44, *Smith v. Lidcote*.

It is not usual to make a rule for putting off the trial of a cause longer than to the next term, or the next assize, after the rule for putting it off is made.

But upon the particular circumstances of a case, the court will make a

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rule for putting off the trial of a cause to the second term after the rule for putting it off is made.

Rep. of Pr. in C. P. 45, 119.

It is a general rule, that a motion for putting off a trial must be made two days at the least before the day on which the cause stands for trial.

Rep. of Pr. in C. P. 99; [Imp. K. B. 313.]

But upon the particular circumstances of a case the court will dispense with this rule. After a cause had been called on and made a remanet by consent, a motion was made for putting off the trial on account of the absence of a material witness. A rule for putting it off was made; because it appeared, that it did not come to the knowledge of the defendant, that this witness was a material one, time enough to make the motion for putting off the trial two days before the day on which the cause was to have been tried.

Barn. 452, Hart v. Whitlock.

A motion was made to put off the trial of a cause upon the affidavit of a third person, that J S, an absent person, was a material witness for the defendant. No rule was made. And by the court—The affidavit, that an absent witness is a material one, must, in order to obtain a rule for putting off a trial, be made by the defendant himself.

Barn. 437, Carter v. Uppington.

The defendant's attorney, in order to obtain a rule for putting off a trial, made affidavit that J S was a material witness for the defendant; and that he was beyond York, and could not be in London time enough to give evidence at the trial. No rule was granted. And by the court—It is settled, that a trial ought not to be put off on account of the absence of a witness, unless the defendant himself make an affidavit, that the witness is a material one.

Rep. of Pr. in C. P. 96, Price v. Warren, Hil. 7 G. 2.

But it appears, from a subsequent case, that it is not {'} always necessary, in order to obtain a rule for putting off a trial on account of the absence of a witness, that the defendant himself should make affidavit that the witness is a material one. Upon showing cause against a rule for putting off a trial on account of the absence of a witness, it was objected, that the affidavit of the witness being a material one was not made by the defendant himself. The rule was made absolute. And by the court—There may be a case, wherein a third person can swear that a witness is a material one, and the defendant himself cannot; as if a factor sell goods for his principal, and employ a porter to deliver them, the factor in this case knows the porter to be a material witness, but the defendant does not.

Barn. 448, Day v. Samson. {'} And see *acc.* 1 Dall. 81, Hunter's Lessee v. Kennedy; 1 Dall. 135, Jackson v. Mason; Peake, N. P. 97, Duberly v. Gunning.}

In order to put off a trial on account of the absence of a witness, the affidavit must be positive that the witness is a material one; for the court will never delay a plaintiff without apparent cause, and nothing is so easy as for a defendant to swear that he believes a witness to be a material one.

Rep. of Pr. in C. P. 81, Welberry v. Lister.

If it appear that the witness whose absence is made the ground of a motion for putting off a trial, was not absent at the time notice of trial was given, the court will not make a rule for putting off the trial.

Barn. 442, Bourne v. Church.

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It is in the general required, that the affidavit for obtaining a rule to put off a trial on account of the absence of a witness, should show at what time the witness is expected to return.

¶ See 1 Chit. R. 730, (a) ; 2 Chit. R. 411. It does not seem necessary to state in the affidavit the *name* of the witness, 2 Dow. & Ry. 420 ; 4 Dow. & Ry. 832.¶

But it is said, that it is not always necessary to show this ; for that in some cases, as if the witness be gone in a ship belonging to a fleet in the king's service, it is impossible to form a judgment at what time he will return, unless the person who makes the affidavit know what instructions were given to the commander of the fleet.

1 Barnard. 39, Anon. ¶ See White v. Lynch, 2 Dall. 183 ; Pennington v. Scott, 2 Dall. 94 ; Bowen v. Douglass, 2 Dall. 44 ; Hunter v. Kennedy, 1 Dall. 81 ; Hollingsworth v. Duane, Wallace, 46 ; Jackson v. Mason, 1 Dall. 135 ; Jackson v. Keeley, 1 Dall. 135 ; Respublica v. Matlack, 2 Dall. 108 ; Jones v. Little, 2 Dall. 182 ; Clark v. Cochran, 1 Miles, 282 ; Davidson v. Brown, 4 Binn. 243.¶

[Where there is no cause of suspicion, the affidavit to put off the trial on account of the absence of a material witness is sufficient in the common form ; namely, that the person absent is a material witness, without whose testimony the defendant cannot safely proceed to trial ; that he has endeavoured, without effect, to get him *subpœna'd*, but that he is in hopes of procuring his future attendance. But if there be any cause of suspicion, the court should be satisfied from circumstances, first, that the person absent is a material witness ; secondly, that the party applying has not been guilty of any laches or neglect ; and thirdly, that he is in reasonable expectation of being able to procure his attendance at some future time.

Tidd's Pr. ¶ 773, (9th ed.)¶ 3 Burr. 1514 ; 1 Bl. R. 436 ;] {8 East, 31, The King v. Jones. ¶ See 1 Dall. 135, Jackson v. Mason ; 2 Dall. 44, Bowen v. Douglass ; 2 Dall. 94, Pennington v. Scott ; 2 Dall. 183, White v. Lynch ; 2 Cain. 384, M-Kay v. Marine Insurance Company ; 1 Mass. T. Rep. 6, Commonwealth v. Millard.}

A motion was made to put off a trial, because the witness who could prove a set-off was absent ; but the court was of opinion, that as this is a collateral defence, and there is no instance in which a trial has in such case been put off, the trial ought not to be put off.

Barn. 437, Roberts v. Downes.

[The illness of the defendant's attorney, and the publication of a paper with intent to influence the jury, have been admitted as causes for putting off the trial.

Say, R. 63 ; 1 Burr. 512 ; 4 Term R. 285.] ¶ Vide 1 Camp. 229 ; Tidd's Prac. 773, (9th ed.) ; 2 Chit. R. 411.¶

¶ The illness of the party is not a sufficient cause to put off the trial ; but if there are material witnesses who have not been summoned, in consequence of his sickness, or if the party himself is a witness to prove books or the like, that may have weight with the court.

2 Dall. 182, Jones v. Little.}

¶ An application to put off a trial beyond the present sittings, or from sittings to sittings, is never allowed in the King's Bench on the part of the plaintiff, who, having a control over his own record, has only to withdraw it, if he find he is not prepared to try the cause. (a) Much valuable time is thus saved, which would be wasted in these applications. Nor is there any great hardship imposed upon the plaintiff ; for even if the judge were to make an order to put off the trial, he must pay costs to the defendant ; and, either way, he could bring on his cause again for trial with equal facility.

(I) At what Time an Indictment may be tried.

But where, from the sudden indisposition of a witness, who may be able again to attend in the course of a day or two, or for any temporary reason, the plaintiff is prevented from trying his cause in its order in the paper, and yet has ground to believe he shall be able to try it before the sittings are over, it would be too much to make him withdraw his record; and a judge at *nisi prius* will therefore, upon these grounds, make an order for the trial to stand over till such time as the witness is likely to attend. (b)

(a) 3 Camp. 33, 34. It had previously been decided by Lord Kenyon, as was formerly ruled by Lord Mansfield, in a Chester case, that the trial could not be put off, in favour of the plaintiff, in an action on a penal statute, Mich. 38 G. 3, K. B. (b) 3 Camp. 333, 334.

It is too late to move for a continuance after one of the jurors has been sworn.

Coleman v. Hess, 1 P. A. Browne, 240.

A cause will not be continued, because there has been published in the newspaper a report of the trial of another suit, depending upon the same facts and principles, which had been tried a short time before.

Hurst v. Wickerly, 1 Wash. C. C. R. 276.

Where the witness is an attorney of the court, and promised to attend, a subpœna is not requisite, to entitle the party to a continuance.

White v. Lynch, 2 Dall. 183.

When one of the parties to a cause is not prepared, in consequence of expecting a compromise from the declarations of his adversary, the trial will not be ordered on, and the costs in such case will be ordered to continue on the *remanet*.

Cornog v. Abraham, 1 Yeates, 18.

In general the absence of a party is not a sufficient ground for a continuance.

Goodwin v. White, 1 P. A. Browne, 272; Jones v. Little, 2 Dall. 182; Phillips v. Gratz, 2 Penns. 412.

(I) At what Time an Indictment may be tried before Justices of *Oyer* and *Terminer*.

It has been holden, by all the judges of England, that judges of *oyer* and *terminer* cannot proceed to the trial of an indictment upon the day that issue is joined; but that justices of jail delivery may.

Keilw. 159.

The reason given for the difference is, that as justices of jail delivery, some time before their coming, issue a general precept to the sheriff, for returning before them at the day of their session twenty-four out of every hundred, to do those things which shall be enjoined them on the part of the king, it is presumed, that there are always enough of those returned under the general precept in court, out of whom the sheriff, an award being for that purpose made by the court, may return a jury immediately under the general precept.

4 Inst. 164; 2 Inst. 568; 2 Hawk. P. C. c. 41, § 4.

This reason does not appear to be conclusive; for a general precept is issued, at the same distance of time before their holding of a session, and in the very same terms, by justices of *oyer* and *terminer*.

2 Hawk. P. C. c. 41, § 4.

But whether the difference depends upon usage, or upon whatsoever it

(K) Of the Manner of trying, where more than one Issue is to be tried.

does depend, the law seems to be settled, that justices of *oyer* and *terminer* cannot award a jury for the trial of an indictment, to be returned immediately out of those returned under the general precept; but that they must issue a *venire facias* for the returning of a jury.

4 Inst. 464; 2 Inst. 568; 9 Rep. 118; 3 Hawk. P. C. *ubi supra*.

It was in one case insisted, that justices of jail delivery have not a power to award a jury to be returned immediately for the trial of an indictment, unless the party indicted be in prison; but the opinion of the court was, that such justices can as well do this where the party is not in prison as where he is.

Cro. Car. 340, Rex v. Chapman.

It is said by Coke, C. J., that although justices of *oyer* and *terminer* cannot award a jury, to be returned immediately for the trial of an indictment, out of those returned under the general precept, they have a power in all cases to award a *venire facias* returnable immediately, and he cites divers old cases in which such power was in fact exercised.

4 Inst. 164; 2 Inst. 568.

But it seems to be the better opinion, that justices of *oyer* and *terminer* cannot award a *venire facias* returnable in less than fifteen days.

In one case a *venire facias* returnable immediately, which was awarded by justices of *oyer* and *terminer* for the trial of an indictment for barratry, was holden to be good; because it had been awarded with the consent of the party indicted; which shows that without such consent it would not have been good.

1 Sid. 99, Rex v. Sadler.

And it may be inferred from divers other cases, that justices of *oyer* and *terminer* cannot award a *venire facias*, returnable in less than fifteen days for the trial of an indictment.

2 Roll. Abr. 626; Cro. Car. 315, 448.

If an indictment be found in a county wherein the Court of King's Bench sits, a *venire facias*, returnable immediately, may be awarded for the trial of the indictment. But, if an indictment for a misdemeanor, found in a county wherein the Court of King's Bench does not sit, be removed into that court, a *venire facias* returnable in less than fifteen days cannot be awarded for the trial of the indictment.

9 Rep. 118, Ld. Sanchar's case.

(K) Of the Manner of trying, where more than one Issue is to be tried.

If in an action against two, one of the defendants plead a plea in abatement, and the other a plea which goes to the action, and issues be joined upon both pleas, the issue upon the plea in abatement ought first to be tried; because, if this be found against the plaintiff, the whole action abates.

1 Inst. 125; 2 Roll. Abr. 628, pl. 7.

If in a personal action against two, one of the defendants plead a plea which goes to the action, and the other a plea which extends only to himself, and issues be joined upon both pleas, the issue upon the former plea ought to be first tried; because, if this be found against the plaintiff, the

(K) Of the Manner of trying, where more than one Issue is to be tried.

other defendant may take advantage of the verdict, in which case there will be an end of the action.

1 Inst. 125; Bro. *Trial*, pl. 1, pl. 48; 2 Roll. Abr. 627, pl. 1.

If in an action of trespass against two, one of the defendants plead a release, and the other a plea which extends only to himself, as not guilty, or a justification, and issues be joined upon both pleas, the issue upon the former plea shall be first tried; because, if this be found against the plaintiff, it makes an end of the action; the discharge of one defendant being in such case a discharge of both.

1 Inst. 125; 2 Roll. Abr. 628, pl. 5.

If a personal action be brought against two, and one of the defendants plead a plea which extends to himself only upon one day, and the other a plea which extends to himself only upon a subsequent day, and issues be joined upon both pleas, the issue upon the former plea ought to be first tried; because it shall be intended to have been first pleaded.

Bro. *Trial*, pl. 48.

If a real action be brought by J S as heir to his father against two, and one of the tenants plead a plea which extends only to himself, and the other a plea which goes to the action, as that the demandant is a bastard, and issues be joined upon both pleas, it is not material which of the issues is first tried; for, although that which goes to the action be first tried and found against the demandant, the other shall nevertheless be tried; because the demandant may recover that part of the land of which the other tenant is in the possession.

2 Inst. 125; 1 Roll. Abr. 628, pl. 9.

If in an action an issue be joined as to part, and there be a demurrer as to the residue, it is in the discretion of the court to order the issue to be first tried, or the demurrer to be first argued.

1 Inst. 125. {See 2 Cain. 320, *Munro v. Alaires*; 2 Burr. 753, *Cooke v. Sayer*; 2 Term 394, *Duberly v. Page*.}

||Where there are several issues in law and in fact, it seems now in practice to be generally in the plaintiff's option to have the issues in law determined either before or after the trial of the other issues. But though the plaintiff, in ordinary cases, has a right to marshal his own proceedings, provided he conform to the rules and practice of the court, yet still if the court see that the ends of justice will be better promoted by first determining the question of law on the demurrer, they will postpone the trial of the issue. In fact, where the course of proceeding rests with the parties, it is often advisable to determine the demurrer first; for if it goes to the whole cause of action and is determined against the plaintiff, it is conclusive, and there is no occasion afterwards to try the issue in fact: whereas if the issue in fact is tried and found for the plaintiff, he must still proceed to the determination of the demurrer, and if that be determined against him he will not be allowed his costs on the trial of the issue in fact. 2d. This mode of proceeding prevents confusion and embarrassment at the trial, particularly where contingent damages are to be assessed. 3d. The determination of an issue in law is generally more expeditious and less expensive than the trial of an issue in fact: and, lastly, whether the demurrer go to the whole or part of the cause of action, if the plaintiff proceed to argue it first, and the court are of opinion against him, he may amend as at common law; but after the cause has been carried down to trial,

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he cannot amend any further than is allowable by the statutes of amendment.

2 Will. Saund. 300; *Burdett v. Coleman*, 13 East, 41, 47; *Tidd's Pract.* 776; 2 Will. Saund. R. 300.]

At a trial at bar, in which eleven issues directed by the Court of Chancery were to be tried, it was moved, that the evidence as to the different issues might be gone through separately, and the case of *Lord Thanet v. Sir Edward Knatchbull* was cited; in which divers issues directed by the Court of Chancery had been tried in divers terms. This was consented to by the other side. And by the court—The doing of this is quite reasonable: for if the evidence be not gone through separately, it must in summing up be separated by the judge, otherwise the jury will not be able to find a proper verdict.

Sayer, 131, *Kemp v. Mackerill*.

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1. *In the General.*

WHERE several persons are charged in the same indictment with the same offence, each defendant has a right to be tried separately.

United States v. Sharp, Peters' C. C. R. 118. But see 1 Bald. R. 81; 12 Wheat. 450; and 5 Serg. & R. 60, where it is said that a separate trial is matter of discretion with the court; and see *Bouv. L. D. Separate Trial*; *United States v. Gibert*, 2 Sumn. 19.

The case of *Wood v. Gunston*, which was in the year 1655, is the first case reported in the books, wherein a new trial was granted.

Sty. 462, *Wood v. Gunston*.

But it is said, that it ought not from thence to be concluded, that this was the first instance of granting a new trial; for that the silence of reporters as to this matter may be imputed to its not having been formerly the practice to report what was done by courts upon motions.

1 P. Wms. 207, *Rex v. The Corp. of Bewdley*.

It is said by Holt, C. J., that the granting of new trials must have been much more ancient than the case of *Wood v. Gunston*; because it was long before this case a good cause of challenge to a juror, that he had before been a juror in the same cause.

Salk. 648, *Argent v. Darrell*. [In 11 Mod. 119, it is said that Lord Holt cited a case in Edward the Third's time, where a new trial was granted, because a great lord concerned in the cause sat upon the bench at the trial.]

But it is said in another case, that what is said by Holt, C. J., in the case of *Argent v. Darrell* is not of much weight; for that the challenge, because a man had before been a juror in the same cause, might have been where a *venire facias de novo* had been awarded.

Stra. 995, *Rex v. Bell*.

[If an issue be directed by a court of equity, the motion for a new trial must be made before that jurisdiction. But in that case, it is not, as at law, to set aside the verdict; for a court of equity frequently grants a new trial without setting aside the verdict, which is of great consequence to the parties; for then it may be given in evidence, though not conclusive; either party being at liberty to show on what grounds it was obtained.](a)

[6 Taunt. 444; 8 Dow. & Ry. 71; {Ves. 28, 29. See 11 Ves. J. 50; 1 Johns.

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Ca. 402; 1 Cain. 487.} (a) But where on the trial of an issue directed by the Lord Chancellor, leave is given by the judge to move for a new trial, the motion may, it seems, be made in the court where the cause was tried. 2 Chitt. R. 270. And in an action brought under the Lord Chancellor's order, the application for a new trial must be made in the court where the cause is depending. Coop. Ca. 96; 4 Maule & S. 192; and see 1 Eden, 270; 1 Vern. 292; 4 Ves. 206; 6 Ves. 90; 9 Ves. 165; 11 Ves. 52; 3 Ves. & B. 41; Tidd, 913, (9th ed.)||

β An application to a Court of Chancery for a new trial in an action at law must be founded on circumstances, not produced by the neglect or within the control of the applicant, which prevented him from applying to the court that tried the cause, during the term.

Gales v. Shipp, 2 Bibb, 241; Ward v. Childs, 3 J. J. Marsh. 487; Yancey v. Downer, 5 Litt. R. 10.

When the chancellor conceives that a new trial should be had at law, instead of setting aside the judgment and granting a new trial, he ought, regularly, to compel the successful party at law to submit to a new trial, by operating on his person with the process of injunction, attachment, sequestration, &c.

Litt. Sel. Cas. 451; Hunt v. Bayer, 1 J. J. Marsh. 484; Yelton v. Hawkins, 2 J. J. Marsh. 2.

A court of equity will not grant a new trial to a plaintiff in ejectment, merely because he shows he has a better title, and because the defendant's witnesses were corrupted, and the influence of powerful men exerted to produce the verdict.

Blount v. Garen, 3 Hayw. 88.

Upon a bill filed, a court of equity may order a new trial at law; but it should appear that some untoward circumstance prevented an application to the court who heard the cause; or some invincible obstruction that rendered the application ineffectual, and that to do justice, it ought to have succeeded.

Barry v. Green, 5 Hayw. 67.

The chancellor will direct a new trial of an issue, upon affidavits, proving misbehaviour of the jury afterwards discovered, but not upon affidavits tending to prove that the verdict is contrary to evidence.

Pleasants v. Ross, 1 Wash. 156.

Upon a bill of injunction filed, a new trial at law was granted; a verdict was found for the complainant, but certified by the judge to be against the weight of evidence; another trial being directed, a second verdict was found as before; whereupon the judge certified, with the verdict, all the evidence given to the jury; from which it clearly appeared that the merits of the case were clearly against the complainant. The court of appeals thereupon dissolved the injunction, and dismissed the bill with costs.

Ruffners v. Barrett, 6 Munf. 207.

The English rules relative to new trials of issues out of Chancery, are not applicable to the courts of the United States, where the same judges that direct, superintend the trial of such issues: the only question is, are the judges satisfied with the verdict?

Harrison v. Rowan, 4 Wash. C. C. R. 32.

A motion to grant a new trial on a feigned issue, to try the question of adultery, ought to be made to the Court of Chancery.

Doe v. Roe, 1 Cowen, 216.

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A court of equity granted a new trial where a verdict was given on an issue directed by such court.

Bowman v. Middleton, 1 Desaus. 163.

It is no ground for a new trial in a suit in Chancery, that other persons who might be affected by the decree were not made parties.

Baldwin v. Norton, 2 Conn. 161.

The rules which formerly governed courts of law in granting new trials upon the ground of testimony improperly admitted or rejected, has never been adopted in equity.

Mulock v. Mulock, 1 Edw. 14.

After a trial at law, a court of equity will not grant a new trial merely because injustice has been done. The party must show also that he has done every thing in his power to obtain relief at law.

Faulkner v. Harwood, 6 Rand. 125. See *Arthur v. Chavis*, 6 Rand. 142.

Where, in an issue directed by the Lord Chancellor to be tried at law, points of law are reserved for consideration, the motion for a new trial with a view to have the points discussed must be made in Chancery and not in a court of law.

Stone v. Marsh, 8 D. & R. 71.

The court by whom an issue is directed for the trial of facts in a case of *habeas corpus*, retains a superintending authority over the verdict, and may order a new trial.

Graham v. Graham, 1 S. & R. 330.

In Pennsylvania, on an issue directed by the register of wills, to try the validity of a will, the court before whom it is tried, and not the register, has the power to grant a new trial.

Heister v. Lynch, 1 Yeates, 108.

A new trial will not be granted against strong circumstances of equity.

Denniston v. M'Kean, 2 M'Lean, 253.

Nor unless injustice has been done.

United States v. Martin, 2 M'Lean, 256. See *Wheeler v. Shields*, 2 Scam. 351; *Eldridge v. Huntingdon*, 2 Scam. 539; *Johnson v. Blackman*, 11 Conn. 342.

The proper time of moving for a new trial, if the cause were tried in term, is within the first four days after the day {¹} upon which it was tried; if it were tried in a vacation, within the first four days of the next term; because judgment may be entered up after such four days are respectively past.(a)

{¹} That day is computed as one of the four days. 2 Dall. 229, *Burrall v. Du Blois*; 1 Bin. 292, *Lane v. Shreiner*. And the rule does not extend to cases where the term closes before the four days are expired. 2 Bos. & Pul. 393, *Thomas v. Ward*.} [(a) This rule holds in criminal, as well as civil cases: though in either, if it appear to the court at any time before judgment that injustice has been done by the verdict, they will interpose, and grant a new trial. *Rex v. Holt*, 5 Term R. 436; *Rex v. Gough*, Dougl. 797; *Birt v. Barlow*, Ibid. 171.] {See 1 Binn. 450, *Ewing v. Tees*.} ||Vide 2 Bos. & Pul. 393; 3 Maule & S. 500; *Tidd*, 912, (9th ed.)||

But it has been holden, that if judgment have not been in fact entered up, a motion may be made for a new trial after the day upon which it might have been entered up is past.

Stra. 995, *Gilman v. Smith*, Mich. 9 G. 1.

In a later case however it was holden, that a new trial cannot be moved

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for after the day on which judgment might have been entered up is past, although it have not been in fact entered up; unless the matter upon which the motion is founded were not discovered until such day were past.

Barnes, 443, Willis v. Bennet.

It is in the general true, that a motion for a new trial cannot be made after moving in arrest of judgment.

Salk. 647, Turbeville v. Stamp; ||4 Barn. & C. 160; 6 Dow. & Ry. 281; || {2 Dall. 121.} β In Tennessee, after a motion in arrest of judgment, a new trial cannot be moved for. Moving in arrest of judgment admits that the party is satisfied with the correctness of the verdict. Snapp v. Moore, 2 Tenn. 236; Redford's Adm'r v. Ingram, 5 Hayw. 160.γ

But if the matter upon which the motion for a new trial is founded were not discovered at the time of moving in arrest of judgment, a motion for a new trial may be made after moving in arrest of judgment.

Rep. of Pr. in C. B. 124, Phillips v. Fowler; ||Tidd, 913, (9th ed.)||

And if this be not the case, the court will sometimes give leave to move for a new trial after moving in arrest of judgment; because, if there be reason to arrest the judgment, it would be nugatory for the parties to be at the expense of a second trial.

[Regularly, the motion for a new trial should precede the motion in arrest of judgment, 1 Burr. 334; but the discussion of the latter motion may precede that of the former, for the reason assigned in the text. 6 Term R. 627.]

||When a bill of exceptions has been tendered, the court will not grant a motion for a new trial, unless the exceptions are abandoned; and if pending the motion for a new trial the parties serve a writ of error, it is an admission of the facts of the case, and the new trial will be refused.

2 Chitt. R. 272; Tidd, 913.||

β A new trial will not be granted, where the point of law on which the motion is founded was not made and overruled on the trial of the cause.

Torry v. Holmes, 10 Conn. 499. See Russell v. Stocking, 8 Conn. 236; Davidson v. Bridgeport, 8 Conn. 472.γ

A new trial may be moved for, although the verdict be special; for the intention of a special verdict can only be to reserve a question of law for the opinion of the court, in case the verdict shall stand.

Bunb. 51, Namink v. Farwell. ♦

If due notice of the trial were not given, this is a good reason for granting a new trial; but if a defence were made, the court will not grant a new trial, although due notice of trial was not given, the defect of notice being cured by the defence.

Salk. 646, Thermolin v. Cole; [4 Term R. 552.]

[And where a cause was taken out of its turn and tried as an undefended cause, the counsel for the defendant objecting thereto, and declining to appear, the court refused to grant a new trial, though on payment of costs, without an affidavit of merits.

5 Barn. & A. 907; 1 Dow. & Ry. 553; and see 2 Chitt. R. 269, 270.

Where there is a material variance between the issue or paper book delivered and the record of *nisi prius*, this is a ground for a new trial; but not unless the variance be material to the point in issue, nor if a defence be made at the trial.

Tidd's Prac. 906, (9th ed.)||

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A new trial in an indictment was granted because the defendant had not given due notice of trial.

Sayer, 90, Rex v. Furser.

A new trial cannot be moved for after a nonsuit, the plaintiff being out of court.

7 Mod. 54, Hyon v. Ballard.

But a motion may be to set aside a nonsuit for irregularity, and if it appear to have been obtained irregularly, the court will make a rule for a proceeding in the cause, which answers the same purpose as granting a new trial.

Rep. of Pr. in C. B. 63, 125; 7 Mod. 54; [4 Burr. 1985.]

It has been holden, that a new trial cannot be moved for in the Court of Common Pleas, in a cause which was tried before a judge of another court, unless the fact upon which the motion is grounded be verified by affidavit.

Barnes, 447, Bond v. Palmer.

But in a late case the Court of Common Pleas made a rule to show cause why a new trial should not be granted in a cause which was tried before a judge of another court, although the fact upon which the motion was grounded was not verified by an affidavit.

MS. Rep. Gulliver v. Moffit, East. 8 G. 3.

||And such is the general practice. By a late rule of the King's Bench, (Trin. Term, 5 Geo. 4,) no affidavit shall be used in support of a motion for a new trial in any case, whether criminal or civil, unless such affidavit shall have been made before the expiration of the first four days of the term following the trial, if the cause be tried in vacation, and before the expiration of the four first days after the return of the *distringas*, if tried in term, without special permission of the court.

3 Barn. & C. 176; 4 Dow. & Ry. 836.||

It is in the general true, that the court will not grant a new trial, unless a report be made of the trial by the judge before whom the cause was tried.

3 Keb. 351, St. Bar v. Williams; ||5 Taunt. 340.||

But if the judge before whom the cause was tried, die before he make a report of the trial, the court will receive an account thereof by affidavit.

MS. Rep. Bolston v. Holmes, Trin. 30 G. 2, in B. R.; [Rex v. Holt, 5 Term R. 438.] ||See 1 Kenyon, 370.||

The report of the judge before whom the cause was tried is conclusive, upon a motion for a new trial, as to every thing which passed at the trial.

[Ca. temp. Hardw. 23.] ||See 6 Price, 146.||

It is said by Holt, C. J., that if in his judgment the matter deserves a re-examination, he should be for granting a new trial, although it would be contrary to the report of the judge.

12 Mod. 336, Anon.; {1 Dall. 234; 6 East, 202, Parr v. Anderson; Ibid. 257, Dewey v. Bayntun.}

If there have been a view, the court will not, unless there be some special reason for so doing, grant a new trial; because it is to be presumed, that the jury were as much or perhaps more influenced by what they observed upon the view, than by the evidence given in court.

12 Mod. 1, Anon.

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If two persons be defendants in an action, and there be a verdict in favour of one of them, the court will not grant a new trial at the instance of the other; because the verdict must, if set aside, be set aside as to both; and it would be very unreasonable, that he, in whose favour the verdict is, should be a second time in jeopardy.^(a) But if the defendant, in whose favour the verdict is, consent to the granting of a new trial, the court will grant it, provided it be in other respects proper.

12 Mod. 275, *Bond v. Spark* and another; *Stra.* 814; {1 Wash. 325, *Boswell v. Jones.*} [(a) *Collier v. Morris*, M. 1735; *Bull. N. P.* 326; *Cap. Crabb's case*, 23 G. 2; *Ibid. S. P. Fern's case*, Hil. 27 & 28 Car. 2; *Ibid. contrd.* So in an action of trespass and false imprisonment brought in the King's Bench against M. Leroux, a magistrate, and two others, who were constables; the two latter were acquitted, and there was a verdict against Leroux for 20*l.*, which the court set aside, and they granted a new trial as to him; and upon the second trial there was a verdict in his favour. 6 Term R. 625. So, in an indictment for a misdemeanor, where some of the defendants are acquitted, and some convicted, a new trial may be granted as to those convicted. *Rex v. Mawbey*, 6 Term R. 619.] β *Guerrant v. Tinder*, *Gilm.* 36, *acc.* He who desires a new trial must receive it as to the whole cause. *Morris v. The State*, 1 Blackf. 37; *Winn v. Columbian Ins. Co.*, 12 Pick. 279; *Robbins v. Townsend*, 20 Pick. 345; *Williams v. Henshaw*, 12 Pick. 378.γ

β Where the damages are excessive, a new trial may be granted, in order to determine the amount of damages, without opening the whole cause.

Boyd v. Brown, 17 Pick. 453. See 12 Pick. 279; 20 Pick. 345.γ

The court will not grant a new trial if it be probable that the verdict, in case a different one be found upon the new trial, will be given in evidence in a criminal prosecution.

12 Mod. 319, *Richardson v. Williams*.

It is in the general true, that the court will not grant a new trial upon the merits, without the condition of paying the costs of the former trial.

2 Vern. 75; 12 Mod. 370. ¶Vide, as to costs on granting a new trial, *Tidd's Prac.* 915, *et seq.* (9th edit.)¶

β The rule in granting new trial upon payment of costs, is, to give the costs of the term only; and when the party is compelled to pay the whole costs of the suit, the ground for so doing ought to appear.

Logan v. Gibbs, *Lit. Sel. Cas.* 20.γ

But the court will sometimes grant a new trial upon the merits, without the condition of paying the costs of the former trial.

β Where a new trial is granted, on the ground that the verdict was manifestly against the weight of the evidence, the party moving for such new trial will not be subjected to the payment of costs.

Johnson v. Scribner, 6 Conn. 185.

In granting new trials, the court may lay the party under restrictions, or compel him to submit to terms, but those terms should relate to the cause then before the court.

1 Marsh. 518.

When a verdict is set aside in consequence of a mistake of the jury, the party moving for a new trial is bound, according to the practice of the court, to pay the costs.

Lewis v. Stevenson, 2 Hall, 51.γ

[Where a new trial is granted, and nothing is said in the rule concerning the costs of the first, although the same party succeed on the second trial, he shall not have the costs of the first.

Mason v. Skurry, *Dougl.* 438, S. P.; *Schulbred v. Nutt*, B. R., M. 23 G. 3; and

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Hankey v. Smith, 3 Term R. 507;] {1 East, 111, **Bird v. Appleton**. In the Common Pleas the costs of both trials are allowed, though the rule is silent about them. 1 H. Black. 639, 641; 1 East, 112.}

{When the costs abide the event of the cause, if the same party succeeds again on a second trial, he is entitled to the costs of both trials; but if the verdict be different on the second trial from what it was on the first, then the party succeeding on the second trial shall only have the costs of that trial allowed.

8 Term, 619, **Austin v. Gibbs**; 1 East, 112, **Bird v. Appleton**; 1 H. Black. 639, **Rouse v. Bardin**, and **Parker v. Wells** in the note; *Ibid.* 641, **Trelawney v. Thomas**; 5 Bos. & Pul. 382, **Chapman v. Partridge**.}

It being discovered that the jury had drawn lots in order to determine for which party they should find a verdict, the court granted a new trial, and ordered that the costs of the former trial should abide the event thereof.

Stra. 642, **Hale v. Cove**; {3 Cain. 61, **Smith v. Cheetham**; *Ibid.* 96, **Woods v. Hart**. Vide *Willes*, 488, **Norman v. Beaumont**; } [Rex v. *Ld. Fitzwater*, 2 Lev. 139; 1 Freem. 414, S. C.; **Foster v. Hawden**, 2 Lev. 205; **Fry v. Hardy**, Sir T. Jon. 83; **Philips v. Fowler**, *Barnes*, 441; *Com. Rep.* 525; *Pr. Reg.* 409; *Andr.* 383, S. C., S. P. In **Parr v. Seames**, *Barnes*, 438, the court would have admitted affidavits of the jurors themselves to substantiate the fact. {And such affidavits were held to be admissible in 3 Cain. 57, **Smith v. Cheetham**; 1 Mass. T. Rep. 530, **Grinnell v. Philips**; and see 4 Dall. 112, **Bradley's lessee v. Bradley**; 1 Wash. 79, **Cochran v. Street**; 1 Hen. & Mun. 385, **Price's Ex'ors v. Warren**; 2 Hen. & Mun. 245, **Anderson v. Fox**.} But in **Vassie v. Delaval**, 1 Term R. 11, the court refused to receive them; and see **Pryor v. Powers**, 1 Keb. 811.] ¶ And in 1 New R. 326, the court refused to receive them; and see 8 Taunt. 26; 1 Moo. 455; 7 Moo. 87; 3 Brod. & B. 272, S. C., and *post*, p. 613. [4 Bos. & Pul. 326, **Owen v. Warburton**, *acc.*]

{If there is no question on the evidence, and the jury find contrary to law, {¹} the costs shall abide the event of the suit. So if a new trial is granted on account of the mistake {²} of the judge.

{¹} 1 Johns. Ca. 279, **Van Rensselaer v. Dole**; 2 Burr. 1224, **Edie v. East India Co.**; 1 W. Black. 298, S. C.; *Ibid.* 670, **Pochin v. Pawley**. {²} 2 Cain. 253, **Williams v. Smith**; 1 W. Black. 670, **Pochin v. Pawley**; 3 Wils. 146, **Buscall v. Hogg**; *Ibid.* 338, **Rackham v. Jesup and Thompson**.}

At the trial of an action of false imprisonment against a justice of the peace, it appeared that the action was commenced within six months after the end of the imprisonment of the plaintiff, but not within six months after the day of his commitment. It was ruled by *Willes*, C. J., before whom the case was tried, that the action was not commenced within the time limited by the 24 Geo. 2, c. 44, and the plaintiff was nonsuited. A new trial was granted, without the condition of paying the costs of the former trial.

MS. Rep. **Pickersgill v. Palmer**, Hil. 2 G. 3, in C. B. [*Rice v. Shute*, 2 Bl. Rep. 698, S. P.]

Two bills of exchange, drawn by Colonel Clive upon the East India Company, payable to Campbell or order, had been endorsed by Campbell to Ogilby; but the words *or order* were not added in the endorsement of one of the bills. Both the bills being afterwards endorsed by Ogilby to Edie and Lard and order, an action of *assumpsit* was brought upon them. There being no doubt as to the bill which was endorsed to Ogilby or order; the jury found for the plaintiffs as to the count wherein this was declared for. As to another count, wherein the bill endorsed to Ogilby only was declared for, they found for the defendants; but their verdict as to this count was grounded entirely upon evidence, that by the usage of merchants this bill was not assignable to the plaintiffs, because the words *or*

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order were not added in the endorsement from Campbell to Ogilby. Upon a motion for a new trial, Lord Mansfield, C. J., before whom the cause was tried, reported that he told the jury, that by the general law every endorsement of a bill of exchange would follow the nature of the original bill; and consequently, that if the original bill were payable to J S and order, an endorsement by J S to J N would be a good assignment to J N and his order, notwithstanding the words *or order* were not added in the endorsement to J N. But that, if they were fully satisfied from the evidence which had been given, that the words *or order* are by the usage of merchants necessary to the enabling of an endorsee to assign a bill of exchange, they ought to find for the defendants as to that bill in the endorsement of which these words were not added. His lordship added, that at the trial of the cause he was of opinion, that evidence of the usage of merchants was in this case admissible; but that, having since looked into the cases upon the point, and considered the matter with great attention, he is now clearly of opinion that he ought not to have admitted such evidence; and, consequently, that as the verdict upon that count which is found for the defendants was entirely grounded upon evidence of the usage of merchants, a new trial ought to be granted. The other justices being of the same opinion, the remaining consideration was, whether the new trial should be granted upon the usual condition of paying the costs of the former trial. It was holden that no costs should be paid. And by the court—As a verdict must, if set aside, be set aside generally, and this verdict is agreed to be right as to the count which is found for the plaintiff, there is no reason that he should pay the costs of the former trial.

MS. Rep. *Edie and Lard v. the East India Comp.*, Trin. 1 G. 3, in K. B.; [2 Burr. 1216; 1 Bl. Rep. 1216, S. C.; *Tindal v. Brown*, 1 Term R. 167, S. P.]

It is said that when a new trial is granted, the first verdict ought to stand as a security, for that otherwise the party against whom it was obtained may spirit away the witnesses upon whose testimony it was founded, and thereby deprive the other party, both of the benefit of the first verdict, and of the means of obtaining a second.

12 Mod. 439, Anon.; Sty. 466; {7 Term, 529, *Pleydell v. Earl of Dorchester*; 6 Ves. J. 90, 91. The amount of the verdict will not be ordered to be paid into court, because the bail have become bankrupts. 1 Cain. 11, *Hallet v. Cotton*.}

It is in the general true, that if a new trial has been granted, and there be a verdict for the same party in whose favour the verdict upon the first trial was given, the court will not grant a third trial.

Salk. 649, *Clark v. Udall*; Stra. 692; {2 Johns. Rep. 467, *Talcot v. Marine Ins. Co.*}

But upon the particular circumstance of a case, as if the second verdict have been obtained by unfair practice, the court will grant a third trial.

6 Mod. 22. [The court will grant any number of trials in the same action, if the verdicts be against law. *Tindal v. Brown*, 1 Term R. 171;] [Tidd, 905, (9th ed.)] {1 Johns. Ca. 336, *Silva v. Low*; 1 Bay. 269, *Adm'rs of Moore v. Cherry*; 4 Ves. J. 206.}

It is said that courts of equity do not grant a new trial as a thing of course, although an estate of inheritance will be bound by the verdict; for that the granting or not granting of a new trial always depends upon the circumstances of the case.

Vin. Trial, 467, pl. 4. [Vide 1 Eden R. 270.] β When a sufficient case is made

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out, a court of equity will grant a new trial at law. *Lawless v. Ross*, 3 Bibb. 486; *Wagoner v. M·Kinney*, 1 A. K. Marsh. 481; *Daniel v. Daniel*, 2 J. J. Marsh. 52; *Ross v. Pynes*, 3 Call, 568. But this is never done except in a very clear case of fraud or injustice. *Banet v. Belshe*, 4 Bibb, 349; *Bishop v. Duncan*, 3 Dana, 15; *Sheppard v. M·Intire*, 5 Dana, 576; *Singleton's Will*, 8 Dana, 349; *Floyd v. Jayne*, 6 Johns. 479; *Smith v. Lowrey*, 1 Johns. Ch. 320; *Apthrop v. Comstock*, 2 Paige, 482; *Kent v. O'Hara*, 7 Gill & Johns. 212.

A new trial cannot be granted by an inferior court, and if the judge thereof do grant one, a *mandamus* lies for a *procedendo ad judicium* upon the verdict.

Salk. 650; *Stra*. 113, 392; *Sayer*, 203. {1 Johns. Ca. 179, *The People v. Justices of Chenango*; 2 Cain. Er. 319, S. C.; 1 Johns. Ca. 241, *Weavel v. Lasher*; 2 Johns. Rep. 371, *Haight v. Turner*.} [But he may set a verdict aside for irregularity. *Rex v. Peters*, 1 Burr. 572; *Jewel v. Hill*, 1 *Stra*. 499;] ||2 *Kenyon*, 290.]

||And the Court of King's Bench would not interfere by *mandamus* to compel an inferior court to grant a new trial in a cause wherein it was alleged injustice had been done to one of the parties.

2 Chitt. R. 250. β A new trial is matter of discretion, and a refusal to grant one cannot be assigned as error. *State Bank v. Hunter*, 1 Dev. 100. See *Steinmetz v. Curry*, 1 Dall. 254; *Jordan v. Meredith*, 3 Yeates, 318; *Commonwealth v. Eberle*, 3 Serg. & R. 9.

By a late statute the courts of King's Bench, Common Pleas, and Exchequer are authorized, in certain cases, to grant new trials of causes which have been commenced and tried in the great sessions of Wales. And a new trial may be moved for in the King's Bench, though the party has not entered into the recognisance required by the act.

5 G. 4, c. 106, § 2, 3, 4, 5; 6 Barn. & C. 427.]

β A new trial will be granted *ex officio* in the sound discretion of the court.

Gale v. Kemper's Heirs, 10 Lo. R. 209.

A new trial will be granted to the same party twice, when there are sufficient grounds.

Commissioners v. James, 1 Murph. 40; S. C., Conf. Rep. 556; 2 Binn. 467; 3 Binn. 26; 3 Binn. 520; 4 Binn. 180; 1 Yeates, 14; 3 Yeates, 200.

Where the law is clearly for the plaintiff, a new trial will be granted although several juries have found for the defendant.

Den ex dem. Jones v. Ridley, 2 Car. Law Repos. 387; *Hamilton v. Bullock*, 2 Hayw. 224; *Murphy v. Guion*, 2 Hayw. 162.

When two verdicts have been found against evidence, but according to the equity of the case, a new trial will not be granted.

Allen v. Jordan, 2 Hayw. 132.

As a general rule, when justice has been done, a new trial will not be granted.

Graham v. Houston, 4 Dev. 232; *Grice v. Ricks*, 3 Dev. 62. See *Cressman v. Carter*, 2 P. A. Browne, 123; *Gorbier v. Emery*, 2 Wash. C. C. R. 413; *Ralston v. Cummins*, 2 Yeates, 436.

It is not sufficient ground for a new trial that the judge is dissatisfied with the verdict; but that combined with other circumstances is sufficient.

Denman v. Baldwin, 2 Penning. 814.

A new trial will not be granted when the party applying for it has a right to review, unless he will abandon such right.

Cogswell v. Brown, 1 Mass. 237; *Byrnes v. Piper*, 5 Mass. 363.

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In general, a new trial will not be granted when the judge who tried the cause is not dissatisfied with the verdict.

Cain v. Henderson, 2 Binn. 108; Smith v. Odlin, 4 Yeates, 468; Ludlow v. Union Insurance Co., 2 Serg. & R. 119.

2. *After a Trial at Bar.*

It is laid down in divers cases, that the court ought not to grant a new trial after a trial at bar, unless there have been a misbehaviour in the jury; for that a trial at bar, by reason of its greater solemnity, is of much more authority than a trial at *nisi prius*.

1 Sid. 58; Salk. 648; 7 Mod. 37; 12 Mod. 93, 128; 1 P. Wms. 213; Prec. in Ch. 193; Ld. Raym. 514.

But it has been holden, in other cases, that the court ought, if the circumstances of the case require it, to grant a new trial after a trial at bar.

Stra. 584, 1105; Ld. Raym. 1360; [1 Burr. 395.]

And it is in one of these cases observed, that in the case of Wood v. Gunston, which is the first case reported in the books wherein a new trial was granted, it was granted after a trial at bar.

Stra. 585, Musgrave v. Nevinson; [1 Ves. 28.]

As the verdict upon an issue directed from the Court of Chancery is only to inform the conscience of the Chancellor, this court frequently grants a new trial after a trial at bar.

Salk. 650, Fenwick v. Lady Grosvenor; {9 Ves. J. 165.}

[A new trial will rarely, if ever, be granted after a trial at bar in a writ of right: the law has made this conclusive: and as the practice of granting new trials has been chiefly taken up since the disuse of attaints, and it is pretty clear that no attaint lay in such case, this has been argued as an additional objection.

Tyssen v. Clarke, 2 Black. R. 941.]

3. *On account of a Defect or Mistake of the Judge before whom the Cause was tried.*

If the judge before whom a cause was tried were therein interested, the court will grant a new trial. And it is said the court will do this, notwithstanding both parties consented to the cause being tried before such judge; for it is not to be imagined that he could be quite indifferent.

2 Lill. Abr. 749.

A new trial was granted because a peer of the realm who was interested in the cause sat upon the bench during the trial.

11 Mod. 119, Lady Herbert v. Shaw.

If the judge before whom the cause was tried made any mistake, the court will grant a new trial; for a judge of *nisi prius* is rather to be considered as having acted in a ministerial than a judicial capacity; and as the ground of granting a new trial is doing justice to the party injured by the verdict, it ought as well to be granted on account of a mistake in the judge as upon account of a mistake in the jury.

10 Mod. 202, Reg. v. the Corp. of Helston. β A new trial will in general be granted, where the judge has misdirected the jury on a point of law. Hoyt v. Dymon, 5 Day, 479. But a new trial will not be granted for such misdirection where entire justice has been done. Jones v. Blackman, 11 Conn. 312. And a misdirection as to the weight of the evidence is not a reason for a new trial. Swift v. Stevens, 8 Conn. 431.

β When in a bill of exceptions it is stated that the judge declared to the

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jury that the evidence was sufficient to entitle the plaintiff to recover, and, with that direction, left the cause to the jury, it will be considered a positive direction to find for the plaintiff; and when there are any circumstances in the case which ought to have been submitted to the jury, a new trial will be awarded.

Fitzgerald v. Alexander, 19 Wend. 402.g

If the judge before whom the cause was tried have refused to admit proper evidence, this is a good reason for granting a new trial.

6 Mod. 242; 7 Mod. 53, 64; *Heath v. Shelby*, 1 Blackf. 229; *Fisher & Bridges*, 4 Blackf. 519; *Hunt v. Adams*, 7 Mass. 518; *Wilkinson v. Scott*, 17 Mass. 249. But a new trial will not be awarded for the misdirection of a judge, when the verdict is in accordance with the weight of the testimony. *Harris v. Doe*, 4 Blackf. 377.g

Where evidence is tendered for one purpose, and it is properly rejected as to that, though it is admissible in another point of view of the case, which has not been alluded to at the trial, the court will not grant a new trial as upon an improper rejection of evidence.

Rex v. Grant, 3 Nev. & M. 106; 5 Barn. & Adol. 1081.

Where evidence tendered at the trial of a cause is formally objected to, and received, and the party by whom it is offered obtains a verdict, a new trial will be granted if the evidence appears to be inadmissible, without entering into any inquiry as to the materiality of such evidence.

Doe ex dem. Tatham v. Wright, 6 Nev. & M. 132.g

If the judge before whom the cause was tried admit improper evidence, which is objected to, the more regular way is to tender a bill of exceptions; but, notwithstanding this have been omitted, the court will grant a new trial.

7 Mod. 64, *Thomkins v. Hill*; 7 Mod. 53; {3 Mass. T. Rep. 124, *Middlesex Canal Corporation v. M'Gregore*.}

A new trial will not be granted where illegal testimony, merely cumulative, has been admitted, and where the jury must have found the way without it.

Allen's Lessee v. Parrish, 3 Ohio, 107.

When irrelevant testimony which may have influenced the jury on the trial has been admitted, a new trial will be granted.

Clark v. Vorce, 19 Wend. 232.g

{If, however, in either of these cases, the evidence admitted or rejected could not vary the issue of the cause, a new trial will not be granted: as if the same facts, to prove which the evidence rejected was offered, were sufficiently established by other evidence, and not controverted; or if evidence was improperly admitted to discredit a witness, but contained nothing which could discredit him, or influence the decision of the jury.

3 East, 451, *Edwards v. Evans*; 1 Cain. 157, 160, *Hoffman & Seton v. Smith*; 2 Cain. 129, *Steinbach v. Columbian Insurance Co.*; 1 Johns. Rep. 222, *Potter v. Lansing*; *Ibid.* 302, 304, *Neilson v. Columbian Insurance Co.* See 9 Ves. J. 169, 170; 11 Ves. J. 52.}

[If the supposed misdirection be a technical objection in point of law, and substantial justice be done, or, generally, if the merits have been fairly and fully tried, a new trial will not be granted; for the application is to the discretion of the court.

Edmonson v. Machell, 2 Term R. 4.]

To entitle a party to a new trial, on account of misdirection of the judge,

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it must appear that the observations of the judge to the jury were erroneous, and also that they were material, and affected the merits of the case.

Jordan v. James, 5 Ohio, 88; *S. P. Hinton v. M'Neil*, 5 Ohio, 509.

Where an infant nine years old brought an action of assumpsit on a promissory note, which contained the words "for value received," against the executor of the maker. No consideration was proved. The judge directed the jury, the words "for value received" implied an existing legal consideration, and that affection for the payee, or friendship for his father, or a desire to avoid the legacy duty, would be sufficient: held, that neither of these was a sufficient consideration, and that, as the jury had been misdirected in that respect, a new trial must be had, though without the direction the jury might have presumed an existing legal consideration.

8 D. & R. 163; S. C., 5 B. & C. 501.

Although the judge may make a mistake in his charge to the jury, as by stating to them there was no evidence as to a particular point, when in fact there was some evidence, yet if the jury find against the charge, a new trial will be granted.

Fleming v. Marine Ins. Co., 4 Whart. 59.

A new trial was granted where the jury presumed the existence of a *venditioni exponas* on very slight grounds, and contrary to the opinion expressed in the charge of the judge who tried the cause.

Willing v. Brown, 6 S. & R. 457.

If the court give wrong instructions to the jury, and they find accordingly, a new trial must be granted, although the evidence would warrant the finding.

Gillespie v. Gillespie's Heirs, 2 Bibb, 93. See *Brackenridge v. Anderson*, 3 J. J. Marsh. 716.

If a question of law be improperly submitted to a jury, and they decide it correctly, a new trial will not be granted.

Smith v. Shepard, 1 Dev. 461; *State v. Jackson*, 2 Dev. 563.

When a witness has been improperly admitted on exceptions, a new trial will be granted; but on a special verdict judgment must be entered.

Per Jones, Chancellor, and *Spencer*, Senator, *Powell v. Waters*, 8 Cowen, 669.

When improper evidence has been admitted, which could not fail to influence the jury improperly, a new trial will be granted, unless some redeeming circumstance has cured the fault, and given efficacy to the judgment of the jury.

Anthoine v. Coit, 2 Hall, 40.

When improper though merely cumulative evidence has been admitted, judgment must be reversed.

Osgood v. Manhattan Co., 3 Cowen, 621. See *Strang v. Whitehead*, 12 Wend. 64; *Crary v. Sprague*, 12 Wend. 41.

When the verdict may have resulted from the error of the judge, a new trial will be granted.

Wardell v. Hughes, 3 Wend. 318.

When a copy of a paper, not certified by the proper officer, has been admitted in evidence, a new trial will not be granted, if the party afterwards produce a properly certified paper corresponding with that given in evidence.

Potter v. Tyler, 2 Metc. 58.

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When a witness is rejected, and it is afterwards proved that the witness would have proved a contract different from the one declared on, this is not sufficient ground for granting a new trial.

Emerton v. Andrews, 4 Mass. 653.

When a witness is permitted to give his testimony without objection till after the verdict, and without being sworn or affirmed, this is not a sufficient ground for a new trial.

Cady v. Norton, 14 Pick. 236. *g*

|| It is not a misdirection if the judge refer the jury to their own knowledge of any particular facts which have been proved, as matter of illustration only, and not as matter of evidence.

4 Maul. & S. 532; 1 Man. & Ry. 198.

And a judge's direction is not to be objected to on account of particular expressions, if it be such as on the whole, and in substance, could lead to a right conclusion.

1 M'Clel. & You. 338.

2 A new trial will not be granted for misdirection of the judge, because he expressed to the jury a strong opinion upon the facts either way; the whole being left to the discretion of the jury, where the question is one peculiarly for their consideration.

Belcher v. Prittie, 4 M. & Scott, 295; 10 Bing. 408.

Where a judge in his summing up omits specially to leave to the jury a point made in the course of the trial, it is no ground for a new trial if the whole case was substantially left to them.

Robinson v. Gleadon, 2 Scott, 250; 1 Hodges, 245; 2 Bing. N. R. 156. *g*

The court will grant a new trial if the jury are permitted to draw a conclusion of fact from an unstamped instrument.

9 Barn. & C. 369.

The courts will not set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient evidence without it to authorize the finding of the jury.

1 Taunt. 12.

2 On trial, the copy of a copy of a will was read in evidence: though this evidence was held to be inadmissible, yet the court refused to grant a new trial, because the original had since been found, and was produced, properly authenticated; and it corresponded with the paper which had been read in evidence.

Jones v. Zollickoffer, 2 Hawks, 492.

The admission of illegal testimony against a prisoner in a capital case, after objection by his counsel, is a sufficient cause for a new trial.

Commonwealth v. Green, 17 Mass. 515. *g*

Nor is it any ground for granting a new trial that a witness, called to prove a certain fact, was rejected on a supposed ground of incompetency, when another witness established the same fact, which was not disputed by the other side, and the defence proceeded upon a collateral point, on which the verdict turned.

3 East, 451.

So the courts will not set aside a nonsuit on the ground that the case

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ought to have been submitted to the jury, unless this was desired on the part of the plaintiff at the trial of the cause.

1 Taunt. 10; 6 Taunt. 336.

And, if upon the judge's directing the jury to give nominal damages, the plaintiff elect to be nonsuited, the Court of Common Pleas will not set aside the nonsuit and grant a new trial on the ground of the misdirection of the judge.

3 Taunt. 229; and see 9 Price, 291.

It also seems that if a junior counsel at *nisi prius* take a well founded objection which his leader gives up, that court will not entertain it in discussing a rule for a new trial on another ground.

3 Taunt. 531; 4 Taunt. 779.

If a new trial be granted because a judge has improperly nonsuited the plaintiff, it must take place on the whole record, unless there be some agreement between the parties to the contrary.

Tidd, 911, (9th ed.)||

β When a judge directs a jury to reconsider their verdict, in general, his remarks then made are not a ground of a motion for a new trial, yet, if the judge, in the course of such remarks, lay down for the first time in the case an incorrect rule of damages, to which, on reconsideration, the jury conform their verdict, the party who has been affected by such remarks has a remedy by a motion for a new trial.

West v. Anderson, 9 Conn. 107.

The observations of the court to the jury, after the cause has been committed to them, and a verdict brought in, on the question of accepting the verdict, connected with the evidence exhibited on trial, will not furnish ground on which a motion for a new trial can be supported.

Russell v. Bradley, 4 Day, 403.

A judge is not bound to charge on all the points of a case: he may be silent if he will, unless called on by one of the parties to express his opinion on a point of law; but when he passes over one point, which is preliminary, to get at another which could not fairly arise until the first has been disposed of, it is error.

M'Neil v. Massey, 3 Hawks, 91.

It is discretionary with a judge below to receive further testimony after the argument of a case to the jury; but when a judge relying upon a former decision of the Supreme Court, which in his opinion prevented the exercise of such discretion, refused to exercise it, a new trial was granted.

Williams v. Averitt, 3 Hawks, 308; Parish v. Fite, 2 Murph. 258; S. C., 1 Carr L. Repos. 238.

A new trial was granted, because, after the court adjourned, the judge wrote a letter to the jury respecting the cause which had been submitted to them.

Sargent v. Roberts, 1 Pick. 337.

If a judge refuse on motion a matter within his discretion, it is not a ground for a new trial.

Pierce v. Thompson, 6 Pick. 193. See 1 Pick. 1; 6 Pick. 478; 10 Pick. 252; 1 Metc. 221.

When the instruction asked for would have been irrelevant to the issue

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joined, an omission by the court to give such instruction is not a sufficient ground for a new trial.

Corbin v. Brown, 14 Pick. 306.g

4. On account of a Defect, Mistake, or Fault of the Jury by whom the Cause was tried.

If the sheriff did not follow the direction of a rule of court in returning the jury, this is a good reason for granting a new trial.

11 Mod. 1.

But if the party against whom the verdict is in such case found, did make a defence at the trial, the court will not grant a new trial; for as he would have had the advantage of the verdict if it had been in his favour, he ought to be bound by it.

12 Mod. 567, Anon.; 12 Mod. 584.

In the *venire facias* there was the name of Thomas Bucher of A. In the *distringas* this name was left out, and the name of Thomas Carter of A was inserted. Thomas Carter of A being sworn upon the jury which tried the cause, the verdict was holden to be void; because the cause was not tried by twelve of the persons returned upon the panel.

Cro. Eliz. 57, Displin v. Spratt; 1 Roll. Abr. 196, pl. 3.

In the *venire facias* and in the *distringas* there was the name of John Taverner. A person of the name of John Turner being sworn upon the jury which tried the cause, the court upon a motion in arrest of judgment was clear, that if the variance had been in the Christian name judgment ought to be arrested; but they had some doubt, whether, as the variance was in the surname, this ought now to be done; because a man may have two surnames. It was afterwards holden, that judgment should be arrested.

Cro. Eliz. 222, Fermor v. Dorrington.

A person was returned and sworn upon the jury by the name of *Henry*: a new trial being moved for upon an affidavit that his Christian name was *Harry*, it was refused. And by the court—As the record and the jury process are right, an affidavit ought not to be received to contradict them. This was the person who was returned and intended to be upon the jury, and it is commonly understood that Henry and Harry are the same name.

Barnes, 454, Wray v. Thorn; {Willes, 488, S. C.}

A person of the name of Richard Sheppard was returned to serve as a juror on the crown side. This person being in the *nisi prius* court, when Richard Gratter returned upon the *nisi prius* panel was called, he answered, and was sworn upon the jury in the room of Gratter. A new trial being moved for on the part of the defendant, it was said, that the defendant ought to have challenged this man, and that the court will not now receive an affidavit to contradict the record: but a new trial was granted. And by the court—The court are not, in this case, concluded by the record. The twelve jurors who try a cause are, by the 3 Geo. 2, to be drawn out of a box, and consequently, as this man's name never was in the box, the cause has not been tried.

Barnes, 453, Norman v. Beaumont.

John Peace, who was returned upon the panel, did not appear; but when he was called, his son answered, and was sworn upon the jury. A

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new trial was granted. And by the court—This verdict was not found by twelve of the persons returned upon the panel.

Barnes, 455, Russel v. Ball.

|| But where the son of a jurymen, summoned and returned, answered to his father's name when called on the panel, and served as one of the jurors returned on the panel, it was held that it was not of itself a sufficient ground for setting aside the verdict and granting a new trial.

Hill v. Yates, 12 East, 229; Ibid. 231; *β*Falmouth v. Roberts, 1 Dowl. N. S. 633.*g*

However, where, in a similar case, the objection was taken at the trial, and the plaintiff's counsel insisted on proceeding, and obtained a verdict, the court afterwards awarded a *venire de novo*, on the ground that the objection here was taken *in time*.

. Dovey v. Hobson, 6 Taunt. 460; and see Willes, 488.

β It is no reason for a new trial that a talesman sat in the trial of a cause for which he was not returned.

Howland v. Gifford, 1 Pick. 43, n.

In a capital case, a new trial will not be granted because one of the jurors belonged to another county.

Amherst v. Hadley, 1 Pick. 38, 42.

The fact that one of the jury was not drawn and returned according to law, is not sufficient to authorize the court to grant a new trial, if the objection was not made till after verdict.

Amherst v. Hadley, 1 Pick. 38.

The parties by their acts may waive any irregularity in the drawing or selection of jurors.

Orrok v. Comm. Ins. Co., 21 Pick. 436; Comm. v. Norfolk, 5 Mass. 345.*g*

Where on the trial of an information for libel only ten special jurymen appeared, and two talesmen were sworn on the jury, the court would not grant a new trial, on the ground that two of the non-attending special jurymen had not been summoned, though that fact was unknown to the defendant till after the trial.

Rex v. Hunt, 4 Barn. & A. 430.¶

A person returned upon the panel by the name of *Hooper* was challenged, and the challenge was allowed. This man being afterwards sworn upon the jury as a *talesman* by the name of *Hook*, a new trial was granted.

Ld. Raym. 1410, Parker v. Thornton.

{If a juror is struck from the special jury list, and then sworn as a talesman with the knowledge of the party who struck him off, he cannot on that account object to the verdict.

1 Binn. 27, Jordan v. Meredith.}

The court will not grant a new trial because one of the jurors was related to one of the parties; for the other party, who might have challenged this person, ought to suffer for his neglect.

1 Ventr. 30, Cotton v. Daintry; Sty. 100.

β When it is proved that a juror stated before trial that his mind was made up against the party against whom a verdict was found, a new trial will be granted.

Pierce v. Burk, 3 Bibb, 347. See Hardin, 167; Litt. Sel. Cas. 266; United States v. Fries, 3 Dall. 515.

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A new trial will not be granted because of the incompetence of a juror.

Booby v. the State, 4 Yerg. 111.

A new trial will not be granted because one of the jurors was an alien.

Hollingsworth v. Duane, 4 Dall. 353.

A new trial was refused when a special juror was struck off, and then, with the knowledge of the party who struck him off, was sworn as a talesman without objection.

Jordan v. Meredith, 3 Yeates, 318; S. C. 1 Binn. 27.

When the list of special jurors, which had been struck off, contained the names of some who acted as jurors on a former trial, the verdict was set aside.

Ross v. Eason, 2 Yeates, 14.

When the brother-in-law of one of the parties served on the jury with the consent of the other, a new trial will not be granted for this cause.

Spong v. Lesher, 1 Yeates, 326.

A new trial being moved for, because one of the jurors had a suit depending with the plaintiff, against whom the verdict was found, it was refused. And by the court—Why did not the plaintiff challenge this man?

Sty. 129, *Loveday's case*.

When, after the trial, it was ascertained that a juror had previously formed an opinion against the prisoner, in a criminal case, though he stated on oath he had not, a new trial was granted.

Nomague v. The People, Bre. 111. See *French v. Smith*, 4 Verm. 363; *Evans v. M'Kinsey*, 6 Litt. R. 266.

If there were good cause of challenge to one of the jurors, but this was not known, and consequently could not be taken advantage of at the trial, the court will grant a new trial.

7 Mod. 54, *Hyon v. Ballard*.

A person called as a juror, said on oath that he had not formed nor expressed an opinion respecting the guilt or innocence of the prisoner; and after verdict it was proved that a few minutes before the trial he had said to a third person "that he could not serve, because he had made up an opinion," and this was unknown to the prisoner at the time he accepted the juror; held, that a new trial could not be granted, first, because the declaration is not on oath, and, secondly, it is contradicted by the oath of the juror.

State v. Scott, 1 Hawks, 24. See *M'Corkle v. Binns*, 5 Binn. 340.

On a trial for treason, where one of the jurors had previously made declarations, as well in relation to the prisoner personally, as to the general question of the insurrection, in which the defendant was accused of participating, manifesting a bias or predetermination; on these facts being proved, a new trial was granted.

United States v. Fries, 3 Dall. 515.

A new trial will be granted when any gross misconduct or legal impropriety on the part of any of the jurors is made to appear, sufficient to destroy the credit of the verdict.

Grinnell v. Phillips, 1 Mass. 530. See 14 Mass. 205; 12 Pick. 496.

A verdict will be set aside and a new trial granted when there has been intermeddling with the jurors.

Knight v. Freeport, 13 Mass. 218, 220. See 1 Pick. 38.

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When a material paper not in evidence was communicated to the jury by mistake, a new trial was granted, without costs ;(a) or even when the paper was immaterial if delivered by design.(b)

(a) *Whitney v. Whitman*, 5 Mass. 405. (b) *Hix v. Drury*, 5 Pick. 296.

A new trial will be granted if it appear that the jury have proceeded upon an erroneous principle.

Pierce v. Woodward, 6 Pick. 206 ; *Dorr v. Fenno*, 12 Pick. 521.

When the jury have eaten and drank at the expense of the party, and there has been undue management, or a criminal intention appears, a new trial will be granted.

Goodright v. M'Causland, 1 Yeates, 373. See *Ritchie v. Holbrook*, 7 S. & R. 458 ; *Sheaffe v. Gray*, 2 Yeates, 273 ; *Brunson v. Graham*, 2 Yeates, 166 ; *Willing v. Swan*, 1 P. A. Browne, 123.g

A new trial was granted upon affidavits of eleven of the jurors, setting forth that they had agreed to find a verdict for the plaintiff, and to give him five shillings damages ; but that the foreman had, by mistake, given a verdict for the defendant.

Rep. of Pr. in C. B. 66, *Baker v. Miles*.

β When in consequence of the affirmative of the issue being on the defendant, and his beginning the argument to the jury, the jury made a mistake, and found a verdict for the defendant, when they intended to find for the plaintiff, the court refused to grant a new trial.

Bridgewood v. Wynn, 1 Harr. & Wol. 574.

A new trial will not be granted when the jury, probably by mistake, assessed the amount of damages at \$3355 50, instead of \$3357 50.

Lewis v. the Bank of Kentucky, 12 Ohio, 132. See *Smith v. Surbar*, 2 Marsh. 450 ; *Lockett v. Clarke*, Litt. Sel. Cas. 180 ; *Hill v. Propator*, 2 J. J. Marsh. 130.

When the jury find a verdict for defendant against all the evidence in a cause, on a misapprehension of the law, whether arising from their own mistake, or a misapprehension of the judge, a new trial will be granted.

Gregory v. Tuffs, 1 C. M. & R. 300 ; 2 Dowl. P. C. 771 ; 4 Tyrw. 820.g

A new trial was granted, because the jury found a verdict for the plaintiff, notwithstanding they were directed by the judge before whom the cause was tried, that upon the evidence they ought to find for the defendant.

Sayer, 2, *Golding v. Crowle*.

In an indictment, for putting ducats into the pocket of the prosecutor with an intent to charge him with felony, the jury found the defendant guilty generally. Upon a motion for a new trial, affidavits of all the jurors were produced, in which they swore, that they only intended to find him guilty of the fact of putting the ducats into the prosecutor's pocket, but not of the intent ; and *Foster, J.*, before whom the indictment was tried, reported, that his direction to the jury was, that in case they did not think the defendant guilty of the intent they ought to acquit him. A new trial was granted. And by *Lee, C. J.*—We do not grant a new trial on account of an after-thought of the jurors, for the doing of this would be a bad precedent ; but because the verdict was contrary to the direction of the judge in the matter of law. And by *Denison, J.*—If the verdict had been as the jury intended to find it, namely, that the defendant was guilty of the fact but not of the intent, it would have been an incomplete verdict, and consequently no judgment could have been given.

Sayer, 35, *Rex v. Simons*.

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[It is a general rule, that if the judge of *nisi prius* directs a jury on the point of law, and they think fit obstinately to find a verdict contrary to his direction, that is sufficient ground for granting a new trial; and when the judge, upon a doubt of law, directs the jury to bring in the matter specially, and they find a general verdict, that also is a sufficient foundation for a new trial. But to those general rules there are some limitations as clear as the rules themselves: one is, that if the judge should direct the jury plainly and certainly wrong in point of law, and the jury should find contrary to his opinion, and it should appear to the superior court, under whose direction all trials at *nisi prius* are, (Salk. 643,) that the judge was undoubtedly mistaken, the court would not grant a new trial, because it would be putting the parties to trouble to no purpose; and if the next judge should direct the jury in like manner, and they find accordingly, there must be a new trial for misdirection. Another limitation is, that if it appear upon the record before the court, that it is impossible that the defendant should have judgment by reason of his bad plea, though the verdict were found for him, the court would not grant a new trial. But then these things must appear very clearly, and it must be where every thing appears on the record that can possibly arise upon the trial; for if all the matter do not appear, and the verdict may possibly prejudice the defendant in point of law, the court ought in justice to grant a new trial.

Per Lord Hardwicke, Ca. temp. Hardw. 26;] [4 Barn. & A. 192;] [1 Dall. 234.]

It is in the general true, that if the verdict be contrary to evidence, the court will grant a new trial.

Stra. 1106, 1142. *β* But in general a verdict will not be set aside as contrary to evidence, unless there is a decided preponderance against it. *Cassells v. the State*, 4 Yerg. 149; *Sillars v. David*, 4 Yerg. 503; *Lavender v. Lavender*, 2 Hill's R. 524; *Churr v. Keekley*, 1 Bailey, 479; *Matley v. Montgomery*, 2 Bailey, 11; *Truman v. Peay*, 2 Bailey, 394; *State v. Fisher*, 2 Nott & M'Cord, 261; *Everingham v. Langdon*, 2 M'Cord's R. 157; *Simon v. Billings*, 3 M'Cord, 51; *State v. Kane*, 1 M'Cord, 482; *State Bank v. Hunter*, 1 Dev. R. 100; *State v. Lipsey*, 3 Dev. R. 563; *Simpson v. Blount*, 3 Dev. 34; *State v. Buntin*, 2 Nott and M'C. 441; *Perry v. Smith*, 4 Yerg. 326; *Astor v. Union Ins. Co.*, 7 Cowen, 202; *Smith v. Hicks*, 5 Wend. 48; *Craft v. Plumb*, 11 Wend. 2; *Fowler v. Loomis*, 12 Wend. 27; *Bradstreet v. Clark*, 12 Wend. 602; *Allen v. Jordan*, 2 Hayw. 132; *State v. Jeffreys*, 3 Murph. 480; *State v. Martin*, 3 Hawks, 381.

But in some cases the court will not grant a new trial, although the verdict be contrary to evidence.

If there are two issues, and the verdict be not contrary to evidence as to one issue, the court will not grant a new trial, although it be contrary to evidence as to the other; for as the verdict is right in part, the court will not set it aside.

1 Barn. 9, 317, 533. [In a late case, Grose, J., said, he remembered a case tried some years ago at Bristol, where a new trial was granted as to one issue out of several which had been found against the evidence. 6 Term R. 626.] [But it seems that the new trial in such case must be as to all the issues, 2 Burr. 1224; 1 Black. 298; Bull. N. P. 326; Barnes, 436; and it will not be granted, unless the issue which is found contrary to evidence be a *material* issue, Ibid.; and see Tidd, 911, (9th ed.)] *β* When no judgment can be rendered on the verdict, it may be set aside, and a *venire de novo* will be awarded. *Lawrence v. The People*, 1 Scamm. 415.

β When a case turns mainly on questions of fact, and the court is unable finally to pronounce on one of the pleas, it will be remanded for a new trial.

Varion v. Bell, 12 Lo. R. 384.

When the plaintiff obtains a verdict, and the statement of the case shows

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he had no title, a new trial will be granted; but if the merits appear with the plaintiff, the court will give him leave to file other counts.

Den ex dem. Pollock v. Kittrel, N. C. Term Rep. 152.

A new trial will be granted when the jury find the evidence and not the facts.

Cherry v. Slade's Adm'r, 3 Murph. 82.

When the plaintiff fails to support his declaration by legal evidence, a new trial will be granted, although no objection was made at the time.

Bridge v. Austin, 4 Mass. 115.

When the evidence differs from the declaration in a part not constituting the gist of the action, a new trial will not be granted.

Cunningham v. Kimball, 7 Mass. 65. *g*

In an action upon the case against J S for negligently keeping his fire, by means whereof the house of the plaintiff was burnt down, the verdict was for the defendant. A new trial being moved for, it was refused, although the verdict was contrary to evidence; because it was a hard action. {¹}

Salk. 644, Smith v. Frampton. {¹} 3 Johns. Rep. 180, Jarvis v. Hatheway; 1 Bay. 63, Steel v. Roach; Taylor, 277, Tagert v. Hill.}

β In a case where the jury decide against the weight of evidence, where no flagrant breach of duty has been committed by the person in whose favour they find, and where there may be a difference of opinion, but it is certain that justice has been done, a new trial will not be granted, upon the bare probability that the contract is usurious.

King's Adm'r v. Hill, N. C. Term R. 211. *g*

But if in a hard action there be a verdict for the plaintiff, the court will, in case the verdict be contrary to evidence, grant a new trial.

Salk. 653, Dunckley v. Wade. *β* See Talcott v. Wilcox, 9 Conn. 134; The State v. Lyon, 12 Conn. 487; Witter v. Latham, 12 Conn. 392; Kinne v. Kinne, 9 Conn. 102; Laflin v. Pomeroy, 11 Conn. 440; Eagle Bank v. Smith, 5 Conn. 71; The State v. Stewart, 6 Conn. 47; Newell v. Wright, 8 Conn. 319; Wilcox v. Roath, 12 Conn. 550; Bacon v. Parker, 12 Conn. 212; Palmer v. Hyde, 4 Conn. 426; Brashear v. Barabino, 8 Mart. Lo. R. 680; Morgan v. Bickle, 2 Mart. N. S. 377; Lessee of Muhlenburgh's Heirs v. Florence, 5 Ohio, 245; Webb v. The Protection Insurance Co., 6 Ohio, 456; Howell v. Cincinnati Ins. Co., 7 Ohio, 276, part 1st; Mahan v. Jane, 2 Bibb, 33; Porter v. Langhorn, 2 Bibb, 64; 1 J. J. Marsh. 6; 2 J. J. Marsh. 310; 3 Marsh. 397; 3 Bibb, 313; 4 Bibb, 195; 3 Lit. R. 169; Duane v. Miercken, 4 Yeates, 437; Swearingen v. Birch, 4 Yeates, 322; Pringle v. Gaw, 6 Serg. & R. 298; Griffith v. Willing, 3 Binn. 317; Bartholomew v. Gudykunst, 3 Penns. 493. *g*

β Where the justice of the case is strongly in favour of the plaintiff, but owing to a defect in the pleadings, there is a verdict against him, a new trial will be granted to enable the plaintiff to correct his pleadings.

Nichols v. Alsop, 11 Lou. R. 409. *g*

J S being hung in chains by the sheriff upon the soil of J N, in an action brought by J N, a verdict was found for the defendant. The court, although it was contrary to evidence, refused to grant a new trial; it appearing that the sheriff had done this merely for the conveniency of the place, and not with a design to affront or annoy J N.

Salk. 648, Sparks v. Spicer. *β* See Taggart v. Hill, Tayl. 277; S. C. Conf. Rep. 164. *g*

β In general, a new trial will not be granted where there was evidence on both sides, but this rule is not applicable to a case where the weight of the

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testimony on one part was entirely disregarded, or was countervailed by evidence, which, from its nature, ought to have little or no effect.

Johnson v. Scribner, 6 Conn. 185.

A new trial was granted by the superior court, on motion, for a verdict against evidence.

Bartholomew v. Clark, 1 Conn. 472.*a*

In an action of *assumpsit*, the jury found a verdict for the plaintiff, notwithstanding the defendant proved her defence, which was coverture. A new trial being moved for, it was refused. And by the court—As the defendant was reputed to be a feme sole, and lived as such, she ought not to have set up such a defence, in order to prevent the plaintiff from recovering a just debt.

Salk. 646, Deerley v. The Duchess of Mazarine; {1 Bos. & Pul. 338, Cox v. Kitchen. And in many other cases the courts have refused to grant a new trial where the verdict, though contrary to law, was on the side of the real equity of the case. 1 Bos. & Pul. 339, note (b); 1 East, 583, n; 2 Binn. 129, Campbell v. Spencer. Nor will it be granted for a defect in the pleadings; 1 Johns. Rep. 509, Myer v. M'Clean; or on account of an objection to the form of action. 2 Burr. 936, Foxcroft v. Devonshire; 3 Johns. Rep. 105, Smith v. Elder.} [In a late case where the jury found a verdict for the plaintiff upon a presumption contrary to evidence, the court refused to grant a new trial, because the plaintiff was entitled to recover in conscience and equity. Wilkinson v. Payne, 4 Term R. 468.] ¶The distinction appears to be, that where there are any facts on which the jury have raised a presumption in favour of the justice of the case, the court will not grant a new trial on the ground of the verdict being against evidence, where the action is penal or hard, or the defence unconscionable, (which last was the case in 4 Term R. 468.) But that where a point is saved at the trial, or when the judge misdirects the jury in point of law, there the nature of the action or defence is immaterial, and a new trial must be granted if the verdict is against the point of law reserved, or if the judge's direction is against law. 5 Term R. 20; 10 East, 268; 4 Maule & S. 338; 2 Chitt. R. 273. The case of Cox v. Kitchen, 1 Bos. & Pul. 338, is hardly reconcilable with this rule; since there a new trial was refused after a verdict for the plaintiff on the ground of the dishonesty of the defence, though there was a clear misdirection in point of law by the judge. But the distinction seems settled; and see 3 Barn. & A. 692; 11 Price, 381; 1 Mann. & Ry. 198; Tidd, 910, (9th ed.) There is said to be no instance in which a new trial has been granted where the defendant has pleaded in abatement. 4 Dow. & Ry. 242.¶

¶In general, the court will not grant a new trial in a penal action if the verdict is for defendant, unless on the ground of a misdirection of the judge.

Tidd, 910, (9th ed.) βA new trial will not be refused in an action on the case for slander, on the ground of its being a penal action, or in the nature of one. Johnson v. Scribner, 6 Conn. 185; Horton v. Reavis, 2 Car. Law Repos. 276.*a*

But the statutes 2 & 3 Ed. 6, c. 13, for not setting out tithes, and 11 Geo. 2, c. 19, § 3, for assisting a tenant in carrying away his goods to prevent a distress, are remedial acts; and in actions thereon the courts will grant a new trial for a mistake of the jury.

Lord Selsea v. Powell, 6 Taunt. 297; Stanley v. Wharton, 9 Price, 301.

So also where the action is *trifling*, the court will not grant a new trial, except for a misdirection. And the action is considered trifling if the sum recovered is *under 20l.*

Tidd, 910; 5 Taunt. 537; 8 Moo. 339; 9 Price, 591; 1 M'Clell. & You. 266; 1 Chitt. R. 265.

And a new trial has been granted in trespass for cutting down trees, though the damages were under 20l., where the object of the action was to try a right of a permanent nature.

1 Chitt. R. 265.

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So where the verdict is perverse, the Court of Exchequer will grant a new trial, although the damages given for the plaintiff are less than 20*l*.

1 You. & Jer. 402.¶

The plaintiff in an action of ejectment, who was a mortgagee, claimed under a surrender of the premises as being copyhold; whereas it appeared that they were not copyhold. The defendant claimed under a voluntary conveyance. A verdict being found for the plaintiff, the court, although it was contrary to evidence, refused to grant a new trial; because the granting thereof would, as was said, be contrary to the real justice of the case.

Salk. 644, *Smith v. Page*.

An action of *trover* being brought by a lessor against his lessee, for some trees cut down by the latter, a verdict contrary to evidence was found for the defendant; yet a new trial was refused; because it appeared that the trees were cut down in making ditches, which were of more advantage to the land than the value of the trees.

Salk. 647, *Starr v. Wade*.

A new trial being moved for in an action of trespass, the judge before whom the cause was tried reported that the trespass was proved, and that the jury ought, according to the evidence, to have found a verdict for the plaintiff; but that, in his opinion, sixpence damages ought to have been sufficient. A new trial was refused. And by Lord Mansfield, C. J.—As the granting of a new trial is discretionary, the court will never minister to the passions of either party, by granting one in a case like the present, wherein the justice of the case by no means requires it.

MS. Rep. *Macro v. Hull*, Mich. 30 G. 2, in B. R.; [1 Burr. 11 S. C.]

Upon a motion for a new trial in an action for a libel accusing the plaintiff of disaffection, the judge before whom the cause was tried reported that the jury had found a verdict for the defendant contrary both to evidence and his direction: but that, as the general character of the plaintiff was proved to be that of a Jacobite, and no damage was proved to have been sustained, the jury ought not in his opinion to have given more than two shillings and sixpence damages. The court refused to grant a new trial. And by Lord Mansfield, C. J.—A new trial ought never to be granted, unless some manifest injustice be done by the verdict. As this is a vindictive action, and it was not proved that the plaintiff sustained any damage, the granting of a new trial, by which the plaintiff in all probability would be money out of pocket if he should obtain a verdict, would answer no other end than that of vexing the defendant. It is the duty of the court to see that substantial justice be in every case done to both parties; but they ought never to minister to the passions of either.

MS. Rep. *Burton v. Thompson*, Mich. 32 G. 2, in B. R.; [2 Burr. 664; S. C. *Marsh v. Bower*, 2 Bl. Rep. 851, S. P.;] {1 Johns. Ca. 255, *Brantingham v. Fay*.}

{And in an action for assault and battery, where the injury was trifling, and the jury found a verdict for the defendant, a new trial was refused, notwithstanding the judge misdirected the jury.

3 Johns. Rep. 239, *Hyatt v. Wood*.

So where the cause of action is trifling, and the plaintiff recovers only nominal damages, the court will not set aside a verdict for the misdirection of the judge, if the plaintiff will elect to discontinue without costs.

3 Johns. Rep. 528, *Fleming v. Gilbert*; and see 5 Johns. Rep. 137, *Hunt v. Burrell*.}

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A new trial has in some cases been granted, because the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence.

When a verdict is set aside as unsupported by evidence, a new trial will be granted on payment of costs.

Bank of Utica v. Ives, 17 Wend. 501.

In one case, the verdict was for the plaintiff: but upon the report of Willes, C. J., before whom the cause was tried, that the weight of evidence was, in his opinion, with the defendant, a new trial was granted.

1 Barn. 322, *Wheeler v. Pitt*, Mich. 8 G. 2.

Ryder, C. J., before whom the cause was tried, reported, that there was evidence on both sides; but that the evidence for the party in whose favour the verdict was, was so very slight that the jury ought not in his opinion to have regarded it; and that the evidence for the other party was very strong; and he added that he was dissatisfied with the verdict. A new trial was granted.

Sayer, 264, *Berks v. Mason*, Hil. 29 G. 2. ||See Tidd. 908, (9th ed.)||

In another case, wherein a new trial was granted, it was laid down generally, that the court ought to grant a new trial, if the verdict be, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence, although there was evidence on both sides.

MS. Rep. *Bright v. Enion*, Trin. 30 G. 2, in B. R.; [1 Burr. 390, S. C.]

A new trial has in some other cases been refused, notwithstanding the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence.

In one case where the judge, before whom the cause was tried, reported, that the weight of evidence was with the plaintiff, and that in his opinion the jury ought to have found a verdict for him, a new trial was refused. And by the court—As there was evidence for the defendant, the jury were the proper persons to judge on which side the weight of evidence was.

Stra. 1142, *Ashley v. Ashley*, Mich. 14 G. 2.

In another case a new trial was refused, although Lee, C. J., reported, that the evidence for the plaintiff was very weak, and that he had summed up the evidence strongly for the defendant.

Stra. 1142, *Smith v. Huggins*, Mich. 14 G. 2; [Anon. 1 Wils. 22, *Hankey v. Trotman*; 1 Bl. Rep. 1, S. P.; and *Smith v. Parkhurst*, 2 Stra. 1105. It is well observed by the late judicious editor of Sir John Strange's Reports, that as the distinction between a verdict against evidence, and against very weak evidence, must in many instances appear scarcely perceptible, and the granting of new trials is entirely discretionary in the courts, it rather seems, as if the several cases upon the subject warrant the conclusion, that the courts will grant a new trial where the verdict is manifestly against the weight of evidence, although some proof has been adduced on the other side; provided injustice seems to have been done by the verdict, and the cause is of sufficient value. Vide *Berks v. Mason*, Say, 264; *Norris v. Freeman*, 3 Wils. 39.;] {1 Cain. 162, *Jackson v. Sternbergh*; Ibid. 236, *Barnewall v. Church*; Ibid. 520, *Mumford v. Smith*; 3 Johns. Rep. 271, *Ward v. Center*; 1 Dall. 234, *Steinmetz v. Currey*; 2 Binn. 108, *Lessee of Cain v. Henderson*; Ibid. 495, *Lessee of Fehl v. Good*; Ibid. 510, *Hamaker v. Eberly*.} ||It is not usual to grant a new trial, unless the evidence for the prevailing party be very slight, and unless the judge declare himself dissatisfied with the verdict. 6 Taunt. 336; 2 Chitt. R. 271; 6 Price, 146; 13 Price, 222; Tidd, 908, (9th ed.)||

In another case, Pratt, C. J., before whom the cause was tried, after reporting the evidence specially, expressed himself to this effect:—If I had been upon the jury, and had known no more of the witnesses than I did

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when this cause was tried, I should have thought the verdict ought to have been for the defendant; but I do not choose to declare myself dissatisfied with the verdict, because, where there is a contrariety of evidence as to the principal matter in issue, and the characters of the witnesses on both sides stand unimpeached, the weight of evidence does not depend altogether upon the number of witnesses; for it is the province of the jury, who may know them all, to determine which witness they will give credit to; and no judge has in my opinion a right to blame a jury for exercising their power of determining in such a case. He concluded with leaving the matter to the other justices. A new trial was refused. And by Clive, J.—The granting of a new trial in this case would be taking away that power which is by the constitution vested in the jury. And by Bathurst, J.—As there was in this case strong evidence for the plaintiff, a new trial ought not to be granted; although the weight of evidence was, in my Lord Chief Justice's opinion, with the defendant. And by Gould, J.—It is difficult to draw a line as to the granting of a new trial; and perhaps the granting or not granting of it must always depend upon the circumstances of the case. In the present case there is no reason to grant one.

MS. Rep. Francis v. Baker, Hil. 3 G. 3, in C. B. ||Vide 6 Price R. 146.||

||Where there is evidence on both sides it is not usual to grant a new trial, unless the evidence for the prevailing party be very slight and the judge declare himself dissatisfied with the verdict.

Tidd's Pract. 915.

On trial of a writ of right, where the court is satisfied with the verdict, they will not grant a second trial merely on the ground that the right of the tenant is concluded by the verdict.

Tysen v. Clarke, 2 Black. R. 941.

β When the judge who tried the issue stated that he was not dissatisfied with the verdict, though as a juror he would have found otherwise, the court would not direct a new trial of the issue, if the application for a new trial rested solely upon the ground that the verdict was against the weight of the evidence.

Gibbs v. Hooper, 2 Mylne & K. 353.γ

But in a case of an issue under an enclosure act, where the question was involved in doubt and obscurity, and the property of considerable value, as the right would be bound for ever by the verdict, the court granted a new trial on payment of costs, although there was evidence on both sides, and the court did not think the verdict wrong. But the jury having again found a verdict the same way, the court refused a second new trial, although there was conflicting evidence, and the judge who last tried the cause thought the evidence against the verdict preponderated.

Swinnerton v. Marquis of Stafford, 3 Taunt. 91, 232.||

It is in one case said, that if in an action which sounds in damages, as an action of trespass, only half a farthing be assessed for damages, the court will not grant a new trial, it being in the power of the jury to assess as small damages as they please in such action.

2 Roll. R. 21, Marsham v. Buller.

In an action for words the plaintiff had a verdict with twenty shillings damages. A new trial being moved for, it was refused. And by the

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court—This is a hard case, but the court has constantly refused to grant a new trial on account of the smallness of the damages.

Stra. 940, *Haward v. Newton*, Mich. 6 G. 2.

In an action for a malicious prosecution of the plaintiff for felony, the damages were only six shillings, yet the court refused to grant a new trial. It is moreover in this case said, that the court will never grant a new trial on account of the smallness of the damages; because an attainr would not lie in such a case against the jury, it not being a false verdict: and it is added, that new trials were introduced in the room of attainrs, as being easier and more expeditious remedies.

Stra. 1051, *Barker v. Sir Wolston Dixie*, Trin. 9 G. 2; [*Maurice v. Brenock*, Doug. 509, S. P.]

In an action of *scandalum magnatum* the jury found a verdict for the plaintiff with only twelve pence damages. A new trial being moved for, on account of the smallness of the damages, it was refused. And by the court—No instance has been produced of granting a new trial on account of the smallness of the damages.

Barnes, 445, *Lord Gower v. Heath*, Trin. 13 G. 2.

A new trial being moved for on account of the smallness of the damages, it was refused. And by the court—Where the demand is certain, as if it arise upon a promissory note, the court will grant a new trial on account of the smallness of the damages; but where the demand is uncertain, as in the present case, where it is for the cure of a wound, the court ought not to grant a new trial on account of the smallness of the damages.

Barnes, 455, *Russel v. Ball*, East. 18 G. 2; {1 Bay. 49, *Bourke v. Bulow*; } *Robertson v. Gentry*, 2 Bibb, 543; *Coyler v. Huff*, 3 Bibb, 34.

Where the jury found only 20s. damages in a case of slander, although very gross, the court refused a new trial on the ground of the smallness of damages.

Randall v. Hayward, 5 Bing. N. S. 424.

|| In an action of covenant on a lease, reserving an increased rent for every acre of certain lands converted into tillage, the jury by their verdict having given damages only for the actual injury sustained, and not the amount of increased rent due, contrary to the express direction of the judge, the court granted a new trial.

Farrant v. Olmins, 3 Barn. & A. 692.||

In an action of covenant, in which the damages sustained appeared to be one hundred pounds, there was judgment upon a demurrer for the plaintiff. A less sum being found by the jury upon the execution of a writ of inquiry, a new writ of inquiry was awarded. And by the court—As an action of debt might have been brought for the hundred pounds, the jury ought to have found damages to the amount of the whole sum, unless the defendant had proved something to lessen it. The general rule, of not granting a new trial, or a new writ of inquiry, upon account of the smallness of the damages, does not extend to this case.

Salk. 647, *Anon.*, Mich. 10 W. 3.

Upon a contract for stock, the plaintiff and J S each deposited two hundred pounds in the hands of the defendant. As J S did not perform his part of the contract, the plaintiff brought an action for the four hundred pounds deposited, and obtained judgment upon a demurrer. A writ of inquiry was executed, and the plaintiff proved his case; yet the jury, upon

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a mistaken notion that the defendant could not part with the money without the consent of both parties, found only a penny damages. A new writ of inquiry was awarded. And by the court—The rule of not setting aside a verdict on account of the smallness of the damages, does not extend to this case, in which the jury were mistaken in a point of law.

Str. 425, *Woodford v. Eades*, East. 7 G. 1. ||See *Neale v. Wyllie*, 3 Barn. & C. 533, and *Tidd*, 582, (9th ed.)

Upon the execution of a writ of inquiry the sheriff admitted improper evidence upon the part of the defendant; by reason of which the damages found were much less than they would otherwise have been. A new writ of inquiry was awarded. And by the court—A notion has prevailed, that where the damages are excessive the court may grant a new trial, but that it cannot where they are too small: but there seems to be no good reason why a new trial should not be as well granted in the latter case as in the former.

Barnes, 48, *Tutton v. Andrews*, Trin. 14 G. 2; [*Markham v. Middleton*, 2 Stra. 1259, S. P.]

It is said, that a new trial was granted on account of the excessiveness of the damages in an action for words. And by Glyn, C. J.—Wherever the court believes that the verdict was contrary to the direction of the judge before whom the cause was tried, a new trial may be granted. But in a fuller report of this case, in page 466 of the same book, the new trial does not appear to have been granted merely on account of the excessiveness of the damages, but because the jury had shown a partiality to the plaintiff.

Sty. 426, *Wood v. Gunston*, Mich. 7 C. 2.

In an action of false imprisonment, the jury found a verdict for the plaintiff with 2000*l.* damages, although the plaintiff had been confined by her mother only two or three hours. A new trial was granted on account of the excessiveness of the damages. And by Holt, C. J.—The jury were shy of giving their reason for their verdict, thinking they had an absolute power to find it as they pleased. This is a mistake; for the jury are to try the cause with the assistance of the judge, and they ought to give their reason for their verdict, if required by the judge so to do, that they may, in case they proceed upon a mistaken notion, be set right.

Comb. 357, *Ash v. Ash*, Hil. 8 W. 3.

§ A new trial will be granted when the finding of the jury appears to be a palpable disregard of the rights of a party, and the indulgence of a prejudiced rather than a just view of the cause.

Picquet v. M'Kay, 2 Blackf. 467.

In an action for maliciously prosecuting an indictment for perjury, there was a verdict for the plaintiff with a thousand pounds damages: a new trial was granted. And by the court—It is fit the defendant should try another jury before he is finally charged with such damages.

Str. 691, *Chambers v. Robinson*, Hil. 12 G. 1. [Vide 2 Wils. 249.]

In an action of *scandalum magnatum* for these words, *He is an unworthy man, and acts against law and reason*, the jury found a verdict for the plaintiff with 4000*l.* damages. Upon a motion for a new trial it was sworn, that one of the jury had confessed that they did not find such large damages because they thought the plaintiff so much damnified, but that he might have an opportunity of showing himself noble by remitting the damages.

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A new trial was refused. And by North, C. J.—In a criminal case a man is by *Magna Charta* to be fined with a *salvo contentemento suo*, and consequently no greater fine is to be imposed than he is able to pay; but in a civil action the plaintiff ought to recover a compensation for the damages he has sustained: and he ought in some cases to recover both for the damages he has sustained, and for those which he may sustain. In an action for words, if the words are not actionable in themselves, the jury are only to consider what damages the plaintiff has sustained, and not what he may thereafter sustain; because for the latter he may have a new action: but if the words are in themselves actionable, the jury ought as well to consider the damages which the plaintiff may afterwards sustain, as those which he has sustained. In the present case, the court cannot set a value upon the plaintiff's honour. The jury have given him 4000*l.* damages for the injury thereto done, and as they are by law the proper judges of damages, the court has no power to lessen these, or to grant a new trial. It would moreover be very improper that the court should take notice upon what account the jury found their verdict as it is found. Wyndham, J., was of the same opinion. Atkins, J., was of a different opinion. And by him—In the case of *Wood v. Gunston*, which was an action upon the case for calling the plaintiff bankrupt, the court granted a new trial, because the damages of 500*l.* found by the jury were in the opinion of the court excessive. In the present case, the jury ought only to have considered the damages which the plaintiff had sustained, and not to have given large damages that he might have an opportunity of showing himself noble in remitting them. Scroggs, J., was of opinion with the C. J. And by him—If I had been upon the jury, I should not have assessed such large damages: but as it does not appear that there was any unfair practice upon the jury, a new trial ought not to be granted. Suppose the jury had found only a penny damages, the court would not have granted a new trial, in order to give the plaintiff a chance of obtaining larger damages; and it would be equally unreasonable to grant a new trial, in order to give the defendant a chance of having less damages assessed.

2 Mod. 150, *Lord Townsend v. Hughes*, Hil. 28 C. 2.

β In general the court will not set aside a verdict for excessive damages, unless the amount is so flagrantly outrageous that the jury must be presumed to have been under the influence of passion, partiality, or prejudice.

Sumner v. Witt, 4 Serg. & Rawle, 27; *Douglass v. Toussey*, 2 Wend. 352; *McConnell v. Hampton*, 12 Johns. 234; *Kern v. North*, 10 Serg. & Rawle, 399; *Coleman v. Southwick*, 9 Johns. 45; *Southwick v. Stevens*, 10 Johns. 443; *Ives v. Bartholomew*, 9 Conn. 309; *North v. Cates*, 2 Bibb, 591; *Warford v. Isbell*, 1 Bibb, 249; *Taylor v. Giger*, Hardin, 586; *Bacon v. Brown*, 4 Bibb, 91; *Weber v. Kenny*, 1 Marsh. 346; *Owings v. Ulory*, 3 Marsh. 456; *Riley v. Nugent*, 1 Marsh. 431; *Lockett v. Clarke*, Lit. Sel. Cas. 180.

Where three witnesses concurred in estimating the damages done to the plaintiff's vessel at \$1000 and one at \$1500; and two of the witnesses for the defendant set the damages only at \$300, and one valued the whole vessel at less than \$1000, and the jury found a verdict for \$1548, the verdict was set aside as excessive, and a new trial was granted.

Finch v. Brown, 13 Wend. 601.

A new trial was refused on the ground of excessive damages, where \$5000 were given for posting handbills on plaintiff's door; (a) nor for overflowing lands where some of the witnesses swore to higher damages. (b)

(a) *Ogden v. Gibbons*, 2 South. 518. (b) *Winans v. Brookfield*, 2 South. 847.

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In action against a military commander for an assault and false imprisonment by him committed in arresting the plaintiff, a private citizen, on a charge of treason, confining him for five days, and trying him before a court-martial, the jury found a verdict for the plaintiff for nine thousand dollars damages; a new trial was granted for excessiveness of damages.

McConnell v. Hampton, 12 Johns. 234.

A new trial will not be granted for excessiveness of damages, where the jury gave \$150; although the property which was the subject of damages was sold for \$35, in a case of distress for rent, where the affidavit was not conformable to the statute.

Marguissee v. Ormston, 15 Wend. 368.

In an action against an attorney for a breach of promise of marriage, the jury awarded to the plaintiff 3500*l.* damages, the court refused to grant a new trial on the ground of excessive damages.

Wood v. Hurd, 2 Bing. N. R. 166.

Where in an action of trespass for a forcible entry into a mansion house, under a colour of making a distress for rent, and remaining there for three or four days, the defence was *lib. ten.*, and a justification under a distress for rent, to enforce a claim to the property, for which there was not the slightest foundation, and the jury gave 1000*l.* damages, the court refused to grant a new trial on the ground of excessive damages.

Bland v. Bland, 1 Har. & Woll. 167.

A new trial will not be granted merely for the purpose of reducing the amount of damages in an action on a bill of exchange.

Seally v. Powis, 1 Har. & Woll. 2.*g*

In an action for these words, spoken of a tradesman, *Thou art a beggarly rogue, go pay thy debts*, the jury found a verdict for the plaintiff with 800*l.* damages. A new trial being moved for on account of the excessiveness of the damages, it was refused; because the judge before whom the cause was tried reported, that the plaintiff had given the defendant no provocation, and that he believed the jury had done what they thought to be right.

2 Johns. 200, *Boulsworth v. Pilkington*, Hil. 33 C. 2. *β* See *Clark v. Binney*, 2 Pick. 113; *Shute v. Barrett*, 7 Pick. 82; *Coffin v. Coffin*, 4 Mass. 1.*g*

In an action for criminal conversation with the plaintiff's wife, there was a verdict for the plaintiff with 500*l.* damages. Upon a motion for a new trial, on account of the excessiveness of the damages, it appeared, from the report of Lord Mansfield, C. J., before whom the cause was tried, that the woman had seduced the defendant, and that the defendant was in low circumstances, being only a clerk in the Exchequer, at a salary of about 50*l.* a year. A new trial was refused. And by Lord Mansfield, C. J.—The jury had all the circumstances under their consideration, and in an action founded upon *tort* they are the proper judges as to the *quantum* of damages.

MS. Rep. *Wilsford v. Berkley*, Trin. 31 G. 2, in B. R.; [1 Burr. 609, S. C. In a late case of this kind, the Court of King's Bench dissent. Buller, J., refused to grant a new trial on account of the excessiveness of the damages, though the conduct of the husband appeared in the most unfavourable light. *Duberley v. Gunning*, 4 Term R. 651. *β* *Smith v. Martin*, 15 Wend. 270, *acc.* See *Shoemaker v. Livezly*, 2 P. A. Browne, 286.*g* However, in a subsequent case, in which the case of *Duberley v. Gunning* was pressed upon the court as establishing the position alluded to in the text, and certainly advanced by the judges who refused the new trial in the case of *Duberley v. Gunning*, namely, that in cases of *tort*, where there is no certain rule by which the damages can be ascertained, the court will not grant a new trial on the ground of excessive damages

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—Lord Kenyon is reported to say—“It must be remembered, that although the case of *Duberley v. Gunning* was decided after a very full discussion of the subject, the court were *not unanimous* in the determination. But, *whether rightly or not decided*, that is a case *sui generis*, and cannot govern the present.” The then present case was an action for an assault and battery, in which the court granted a new trial on account of the largeness of the damages. *Jones v. Sparrow*, 5 Term R. 257. In a case of the same nature with that of *Jones v. Sparrow*, Lord Mansfield said, “There is no doubt but the court have the power of taking the opinion of a second jury where the damages are excessive. “But all these questions depend upon their own circumstances, on which the court will exercise their discretion.” *Ducker v. Wood*, 1 Term R. 277. In that case the new trial was refused, and so it was by the same court in *Benson v. Frederick*, 3 Burr. 1845; and by the Court of Common Pleas in *Leith v. Pope*, 2 Bl. R. 184; but in both those cases the courts said, they had the power of granting a new trial where the damages given appeared to be greatly disproportionate to the injury received. And in the case of *Hurry v. Watson*, Tr. 27 G. 3, C. B., where 3000*l.* had been given in an action for a malicious prosecution, the court (on a motion to set aside the verdict for excessive damages) said, they had the power of granting a new trial; and they would have exercised it in that case, if the plaintiff had not agreed to accept 1500*l.* In a case where the Court of Common Pleas refused to grant a new trial on this account, though the Chief Justice said, “there was not one single case (that was law) in all the books to be found where the court had granted a new trial for excessive damages in actions for *torts*,” he added, “We desire to be understood, that this court does not say or lay down any rule that there can *never* happen a case of such excessive damages in *tort*, where the court may not grant a new trial; but in that case the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against at first blush.” *Beardmore v. Carrington*, 2 Wils. 244. The concession here made is indeed guarded, and confined to extreme cases: but when we recollect at what time, upon what occasion, and by whom it was made, it leaves little room to doubt of the power of the courts to interpose in correcting the extravagance of juries. The learned judge, seemingly provoked to feel himself obliged to acknowledge the necessity, and therefore the legality, of such a power, (for he seems to rest the legality upon the necessity,) anxiously endeavours, by way of revenge, to restrain and cramp the exercise of it. The damages must be enormous, more than excessive, to warrant the interposition of the court: and this must be apparent, not to the judges, but to all mankind. The judgment of the court must be authorized by the cry of the multitude! judicial discretion must be guided by popular opinion! The law upon this point seems rather more distinctly as well as more temperately stated by De Grey, C. J., in the case of *Sharpe v. Brice*.—“It has never been laid down,” says he, “that the court will not grant a new trial for excessive damages in any cases of *tort*. It was held, so long ago as in *Comb.* 357, that the jury have not a despotic power in such actions. The utmost that can be said is, and very truly, that the same rule does not prevail upon questions of *tort* as of contract. In contract, the measure of damages is generally matter of account, and the damages given may be demonstrated to be right or wrong. But in *torts* a greater latitude is allowed to the jury; and the damages must be excessive and outrageous to require or warrant a new trial.” 2 Bl. Rep. 942; {7 Term, 529, *Pleydell v. Earl of Dorchester*; 1 Binn. 245, *Hazard v. Israel*; 1 Johns. Ca. 119; 2 Johns. Rep. 63, *Tillotson v. Cheetham*.} We cannot help taking notice, that in several cases where the judges have admitted that a new trial may be granted for *excessive* damages, they have added words of amplification: this, we conceive, in propriety of language, to be unnecessary; for, as far as we recollect, *excessive* is never predicated of any subject but to denote its extraordinary intensesness. Thus Milton—“Dark with *excessive* bright.”] {Even in an action for criminal conversation, the court may grant a new trial for excessive damages, if they are satisfied that the jury acted under the influence of undue motives, or of gross error or misconception of the subject. 6 East, 244, 256, *Chambers v. Caulfield*.} ||Notwithstanding the late learned editor’s attack on the language used by Lord Camden, in 2 Wils. 244, it really amounts in substance to little more than what is quoted from C. J. De Grey, and what appears to be since recognised as the principle on which the courts interfere, on the ground of excessiveness in the damages in actions for *personal torts*, viz.: that the court undoubtedly possess the power of granting new trials on this ground; but that the province of the jury in these cases is wider than in cases of contract, or injuries to property, where the damages are more measurable by a certain scale, (7 Term R. 529;) and that, to induce the court to interfere in such cases by granting a new trial, it must appear to them that the damages are more

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than simply excessive, (considering that term to mean excessive above what the court themselves think the case demands,) that they must be "*enormous*," (in the language of Lord Camden;) "*excessive and outrageous*," (in that of C. J. De Grey;) so great, "*that the jury must have acted under undue motives, or gross error, or misconception*," (in the language of Lord Ellenborough, 6 East, 256;) or so large that *every man must acknowledge they are so*," (in the words of C. J. Mansfield, 5 Taunt. 281.) The criterion mentioned by Lord Ellenborough seems to afford the most certain rule for the guidance of the court, and, it is obvious, this would not apply to cases of simple excess; since, there may be instances of the damages exceeding what the court would judge proper, which would yet not warrant the inference of undue motives, or gross error, or misconception on the part of the jury; and see 1 Younge & J. 477; 9 Barn. & C. 840; Tidd, 909, (9th ed.,) and cases there cited. || In general, a new trial will not be granted on the ground of excessive damages in an action for *crim. con.* Torre v. Summers, 2 Nott & M'Cord, 267. In an action sounding in damages, a new trial ought not to be granted for excessive damages, unless they appear outrageous at first blush. North v. Cates, 2 Bibb, 591; Worford v. Isbel, 1 Bibb, 249; Smith v. Masten, 15 Wend. 270; Shoemaker v. Livezly, 2 P. A. Bro. 286; Kuhn v. North, 10 Serg. & R. 399; Sommer v. Wilt, 4 Serg. & R. 27; Roberts v. Swift, 1 Yeates, 209.

In an action of trespass and false imprisonment there was a verdict for the plaintiff with 300*l.* damages. A new trial being moved for on account of the excessiveness of the damages, it was refused; because the court did not, upon the circumstances of the case, think the damages excessive. It was in this case said by Pratt, C. J.—The court may grant a new trial on account of the excessiveness of the damages, although the action be founded upon a *tort*, and consequently the jury have no certain rule of computing damages, but the court should be very cautious of granting one in such action, and ought not to do it, unless the damages are such as do at the first blush appear to be quite outrageous.

MS. Rep. Leman v. Allen, Hil. 3 G. 3, in C. B.; [2 Wils. 160, S. C. See Huckle v. Money, 2 Wils. 205; Redshaw v. Brooke, 2 Wils. 405; Grey v. Grant, 2 Wils. 252; Bruce v. Rawlins, 3 Wils. 61, where a new trial was refused, on the ground that the damages were not excessive.

|| In an action for criminal conversation with the plaintiff's wife, who was living separate from her husband, under a deed of settlement, securing to her a separate maintenance, the jury gave 2000*l.* damages; and the court refused to set aside the verdict, because it did not appear to them that the jury acted under the influence either of undue motives, or of gross error or misconception.

Chambers v. Caulfield, 6 East, 256.

In an action on the case for a malicious prosecution of the plaintiff, for feloniously embezzling fees received in his office of deputy prothonotary of the Marshalsea Court, where a bill was found, and warrant issued for the apprehension of the plaintiff, and the prosecution was abandoned at the trial, and admitted by the counsel to have been undertaken under a mistake of the facts and the law, the jury gave 2000*l.* damages; and the court refused to grant a new trial, not considering it a case in which they ought to interfere with the province of the jury.

Hewlett v. Crutchley, 5 Taunt. 277; and see 1 Younge & J. 478.

So, where, in trespass for breaking and entering plaintiff's close, and hunting there, in defiance of plaintiff's notice, and under circumstances of insult, the jury gave 500*l.* damages, the court refused to set aside the verdict though the plaintiff had sustained *no actual pecuniary damage*. The court grounded their decision on the insulting and aggravated conduct of the defendant, which distinguishes this case from that of a common damage to property.

Merest v. Harvey, 1 Marsh.

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Where there are fixed rules for measuring damages, and the verdict is excessive, it may be set aside, but where there are no such rules it must stand, unless the damages be entirely disproportionate to the injury.

Coffin v. Coffin, 4 Mass. 1; *Comm. v. Norfolk*, 5 Mass. 435; *Barnard v. Poor*, 21 Pick. 378; *Sampson v. Smith*, 15 Mass. 365; *Worster v. Canal Bridge*, 16 Pick. 541; *Taunton Man. Co. v. Smith*, 9 Pick. 11; *Brewer v. Tyringham*, 12 Pick. 547.

Where in an action on the case for the diversion of the plaintiff's water-course the jury gave 3000*l.* damages, the court set aside the verdict, and granted a new trial, on the ground that the damages were excessive, and not warranted by the evidence: and that, it being a mere question of property, the deterioration of the property was the true measure of damages; though, even in such a case as that, they would not measure the damages given in a nice balance; and they directed the former verdict to stand, as a security for the damages on the second trial.

Pleydell v. Earl of Dorchester, 7 Term R. 529; and see 1 Chitt. R. 729.

A new trial was granted upon its being discovered, after the trial, that the foreman of the jury had declared, that the plaintiff should never have a verdict, whatever witnesses he might produce.

Salk. 645, *Dent v. The Hundred of Hertford*; {1 Bay. 372, *The State v. Hopkins*; 3 Dall. 515, *United States v. Fries*.}

If the jury receive written evidence after they are gone from the bar to consider their verdict, this is a good reason for granting a new trial.

1 Sid. 235, *Goodman v. Cotherington*.

|| But the dispersion of the jury with permission of the judge, during the interval of an adjournment, in case of a misdemeanor, does not vitiate the verdict, when there is no suggestion of their having been improperly practised upon in the interim.

Rex v. Kinnear, 2 Barn. & A. 462; 1 Chitt. R. 401, S. C.; || *Wilson v. Draper*, 8 Pick. 170.

If, after the jury are gone from the bar to consider of their verdict, they hear the evidence of a witness who was before examined, the verdict may be set aside, notwithstanding the evidence were to the same effect as the evidence given in court.

Cro. Eliz. 189, *Metcalfe v. Deane*. {If the jury take out without leave a commission with the depositions annexed, but do not look at them, the verdict will not be set aside on that account. 3 Johns. Rep. 252, *Hackley v. Hastie*.}

But it is said, that the court will not in either of these cases grant a new trial, unless it be endorsed upon the *postea*, that the jury did receive written or hear parol evidence after they were gone from the bar; for that this cannot be shown by affidavit.

1 Sid. 235, *Goodman v. Cotherington*; *Cro. Eliz.* 189.

If the jury carry written evidence which was given in court with them from the bar, without the direction or leave of the court, this is not a reason for the granting of a new trial; but the jury are punishable.

Salk. 645, *King v. Burdett*. || But taking out with them, by mistake, a material paper not given in evidence, or an immaterial paper, if given to them designedly, is cause for granting a new trial. *Whitney v. Whitman*, 5 Mass. 405; *Hix v. Drury*, 5 Pick. 296.

|| Where it was sworn that handbills, reflecting on the plaintiff's character, had been distributed in court, and shown to the jury on the day of the trial, the court granted a new trial, and would not receive from the jury affidavits in contradiction, though the defendant denied all knowledge

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of the handbills. But merely desiring a juror to appear is no cause for setting aside a verdict.

3 Brod. & Bing. 272; 7 Moo. 187, S. C.||

A new trial was granted, because the jury had thrown up cross or pile, whether they should give the plaintiff five hundred or three hundred pounds damages.

Bunb. 51; Mellish v. Arnold, 2 Lev. 140, 205.

The jury drew lots, in order to determine for whom they should find a verdict. A new trial was granted, notwithstanding the verdict was found for the party who in the opinion of the judge was entitled to a verdict.

Stra. 642, Hale v. Cove; ß Mitchell v. Ebele, 10 Wend. 595.g

ß If in order to ascertain the damages, the jury agreed that each juror should set down the sum which he thought the plaintiff should recover, and divided the aggregate by twelve, and returned the quotient as their verdict; held, that this is not sufficient ground for impeaching the verdict, provided there was no previous agreement to be bound by the result.

Dorr v. Fenno, 12 Pick. 521; Grinnell v. Phillip, 1 Mass. 530; Cowperthwaite v. Jones, 2 Dall. 55.

But in *assumpsit* to recover damages for a breach of contract, for not conveying land, where the jury adopted this mode of ascertaining the damages, the verdict was set aside.

Zuber v. Geigar, 2 Yeates, 522.g

[A new trial being moved for upon an affidavit by the defendant's attorney, of a confession of a jurymen to him, that the jury drew lots which six of them should determine the verdict, it was refused; and the court said that, there being no affidavit by the jurymen, or any other that was conusant of the transaction, this was too loose and slight a suggestion. However, in a late case,(a) the court refused to receive the affidavit of the jurymen themselves to substantiate such a fact.

Aylet v. Jewel, 2 Black. R. 1299. (a) Vashe v. Delaval, 1 Term R. 11; and vide Pryor v. Powers, 1 Keb. 811;] ||and see Owen v. Warburton, 1 New. R. 326, acc.||

{ But a new trial will not be granted because, in an action for a *tort*, the jury ascertained the damages by setting down each the particular sum he thought just, and then dividing the aggregate by the number of jurymen. This is not similar to the case of casting lots for their verdict. In *torts* and other cases where there is no ascertained demand, it can seldom happen that jurymen will, at once, agree upon a precise sum to be given in damages; there will necessarily arise a variety of opinions, and mutual concessions must be expected; a middle sum may, in many cases, be a good rule; and though it is possible this mode may sometimes be abused by a designing jurymen, fixing upon an extravagantly high or low sum, yet, unless such abuse appears, the fraudulent design will not be presumed.

2 Dall. 56, Cowperthwaite v. Jones; 1 Mass. T. Rep. 542, Grinnell v. Phillips. See 2 Wils. Works, 356, 357; *contra*, 3 Cain. 57, Smith v. Cheetham, by Spencer and Livingston, Js., Kent, C. J., dissenting. }

||And the court will not suffer the jury to explain by affidavit the grounds of their verdict, or to show that they intended something different from what they found.

Burr. 2667; 2 Black. 803; 2 Term R. 281; *sed* vide 1 Burr. 383; 2 Ken. 24, S. C.; 9 Price, 134; ß State v. Freeman, 5 Conn. 348; Schenck v. Stevenson, 1 Penns. 387;

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Cluggage v. Swan, 4 Binn. 150; *Hix v. Drury*, 5 Pick. 296; *Cochran v. Street*, 1 Wash. R. 79; *Dana v. Tucker*, 4 Johns. 487; *Brewster v. Thompson*, Coxe, 32; *Dan v. M'Allister*, 2 Halst. 46; *Doran v. Shaw*, 3 Monr. 415; *Price v. Warren*, 1 Hen. & M. 385.*g*

§ A new trial will not be granted on the affidavit of two of the jurors that they were influenced in their verdict by information given by one of their own body in the jury-room.

Price's Ex'r v. Warren, 1 Hen. & Munf. 385. See *Cochran v. Street*, 1 Wash. 79; *Pleasants v. Ross*, 1 Wash. 156.*g*

And an admission by jurymen that the verdict was entered by mistake, made after they had separated, though on the day of trial, is not a sufficient ground for a new trial.

2 Chitt. R. 268.

In general, the assent of all the jury to the verdict, pronounced by their foreman in their presence and hearing, is to be conclusively inferred, and no affidavit can in any case be admitted to the contrary. But if all the jury were not present when a verdict of guilty was delivered, and it is therefore uncertain whether they all heard the verdict pronounced by the foreman, the court will, with consent of the defendant, grant a new trial.

Rex v. Wooler, 2 Stark. Ca. 111.¶

The court did in one case refuse to grant a new trial, although the jury found a general verdict, after it was agreed by the counsel on both sides that a special one should be found, and would not give their reason for finding a general one. But it appears that the new trial was in this case refused, because it was moved for after a trial at bar.

7 Mod. 37, *Gay v. Cross*.

In another case, wherein a special verdict was prayed, and the jury, after being directed by the judge before whom the cause was tried, to find a special verdict, found a general verdict, a new trial was granted.

1 P. Wms. 213, *Reg. v. the Corporation of Bewdley*; {1 Dall. 234.}

A new trial being moved for, because the jurors had voted and found their verdict according to the majority of votes, it was refused.

Comb. 14, Anon. § Where the verdict was the result of a lottery, a new trial was granted. *Mitchell v. Eहेle*, 10 Wend. 595.*g*

The jurors had voted, and seven of them were for finding the verdict as it was found. A new trial being moved for, it was refused. And by Lee, C. J.—Nothing was in this case determined by chance. The five jurors might ultimately be convinced; but if they only acquiesced in the finding of the verdict, that is sufficient; and they shall not now be received to say, that they did not acquiesce.

Sayer, 100, *Lawrence v. Boswell*.

§ It is not a good ground for a new trial that the jurors, after agreeing on their verdict, separated without leave of the court.

Wright v. Burchfield, 3 Ohio, 53.

If, before a verdict be agreed upon, one of the jurors separate from his fellows by mistake, and afterwards rejoin them, and there is no room for any unfavourable presumption, a new trial will not be granted on that ground alone.

Burrill v. Phillips, 1 Gallis. 360.

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The jury must pass upon all the facts proper for their consideration, and, if they have not done so, a new trial will be granted.

Gouverneur v. Elliott, 2 Hall's R. 211. *g*

[A new trial has been refused upon a subsequent declaration by the jury, where the verdict given has been according to the real merits of the case.

Clark v. Stevenson, 2 Bl. R. 803. ||See 2 Chitt. R. 268.||

In an action for the non-performance of a contract in not delivering one hundred casks of good Russia tallow, which was tried before Lord Loughborough at the sittings after last term at Guildhall, a verdict was given for the defendants. Adair, Serjt., moved for a rule to show cause why there should not be a new trial. The ground upon which he moved it was, that a conversation had passed after the judge had summed up the evidence, between one of the jury and one Cartwright, the last witness, in which a material piece of evidence had been disclosed; that this conversation was not heard by the plaintiffs, and therefore they had not an opportunity to controvert what the witness said; that, if they had, they could have directly contradicted it. He then offered affidavits to induce the court to believe that the jury had founded their verdict upon this evidence. The circumstances of the case were these: the plaintiffs had contracted with the defendants for one hundred casks of good Russia tallow; fifty of these had been delivered and accepted, but the plaintiffs refused to accept the rest, alleging that it was of an inferior quality. Before the action was commenced, a proposal for an accommodation was made, by the defendants paying to the plaintiffs 3s. per cwt., which was the difference between the price tallow then sold for, and the price for which the plaintiffs had contracted. But this proposal was not acceded to, and it was respecting this that the conversation passed upon which this motion was grounded. One of the jury asked the witness Cartwright why it was not agreed to. His answer was, because the plaintiffs wanted to settle the matter in dispute by casks of 4 cwt. instead of 7 cwt. Lord L., after reporting the evidence, said, that this was a new ground for an application, and such an one as he much doubted whether the court ought to encourage. From the situation of the witnesses at Guildhall, conversations must frequently pass between them and the jury, and it was impossible but such conversations must sometimes escape the court: that if new trials were to be granted upon suggestions of this kind, causes would never be finally settled: that the question here put was, he thought, an idle one, and that no inference could be drawn from it to affect the decision of the jury. The question which he left to the jury was, whether this was good merchantable tallow, or not? No fraud was pretended on either side: both parties wished to act right: the scale of evidence was nearly equal, different opinions having been given on each side of the samples of tallow which the defendants had produced. This question, why the parties did not settle the matter, could not possibly apply to that. Besides, the jury had in the course of the trial calculated that the casks were about 7 cwt., so that this answer could not possibly have any influence with them.

Aubert v. Hardcastle, C. B. Trin. 27 G. 3, MS.]

β When persons, not witnesses, obtrude themselves into the jury-room, and converse with the jury on the subject of the suit, and the jury do not listen to their statements as evidence, this is not sufficient cause for a new trial.

Barbour's Adm'r v. Archer, 3 Bibb, 8. *g*

(L) Of granting a new Trial.

5. *On account of a Neglect or Mistake of a Counsellor or an Attorney in the Cause.*

A new trial is said to have been granted, because the counsel for the defendant, who did not expect that the cause would be called on so soon, was absent. But it is added by the reporter, that a new trial had in a similar case been refused.

Salk. 645, Anon.

¶ When in consequence of sickness one of the attorneys employed is absent at the time of trial, and the other, his partner, had declared his readiness to proceed, this will not be a sufficient ground for granting a new trial.

Flower v. M'Micken, 2 Mart. N. S. 132.

The absence of a witness not summoned, though he was sick, and of the attorney in the cause, who was trying another case in another court, are no ground for a continuance or a new trial.

Soey's Heirs v. Soey's Curator, 13 Lo. R. 424.

Any misconduct of counsel or jury ought to be taken advantage of by new trial, which is the proper remedy.

Morgan v. Bell, 4 Mart. R. 619.

The neglect of the agent or attorney of the party who applies is not a sufficient ground for a new trial. The neglect of the attorney or agent is the neglect of the principal.

Patterson v. Matthews, 3 Bibb, 80; Legrand v. Baker, 6 Monr. 248; Barrow v. Jones, 1 J. J. Marsh. 471.

In general, neither the absence of parties nor the absence of counsel, if voluntary or accidental, is a ground for a new trial.

Gorgerat v. M'Carty, 1 Yeates, 253; Fiss v. Smith's Ex'rs, 1 P. A. Browne, Appendix, lxxi.

In a modern case a new trial being moved for on account of the defendant's attorney having neglected to attend the trial, it was refused. And by the court—As the plaintiff has not been guilty of any misbehaviour or fault, there ought not to be a new trial, which, as his witnesses may die or be out of the way, may be very inconvenient to him: nor is it necessary to grant one; for the defendant, who is bound by the verdict, has a remedy against his attorney.

MS. Rep. Clifton v. Grey, Mich. 31 G. 2, in B. R.

{But if an attorney, from sudden indisposition, was unable to attend, a new trial may be granted.

2 Cain. 381, Koy v. Clough.}

||The fact of a cause being in the written list at *Nisi Prius* is sufficient notice to the attorney that it may be tried at any time in the course of the day; and, therefore, where a cause had been for several days in that list, and was at length tried out of its order, as an undefended cause, in the absence of the defendant's attorney, the court would only grant a new trial on the terms of payment of costs.

Fourdrinier v. Bradbury, 3 Barn. & A. 328. See 1 Price, 201.

And if a cause, which is meant to be defended, is called on and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his brief, the Court of Common Pleas will grant a new trial, compelling the defendant's attorney to pay the costs as between attorney and client, out of his own pocket.

De Roufigny v. Peale, 3 Taunt. 484; and see 2 Chitt. 269.

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A new trial is very rarely granted for default or omission of the parties, their counsel or attorneys, in not coming prepared with, or going into evidence which they were apprized of, and might have produced at the trial, (a) or upon a suggestion that a party was not apprized of particular evidence, and therefore not prepared to answer it, (b) or because a witness refused, from misapprehension, to execute a release which rendered him incompetent, (c) or has either from inattention, or want of being prepared, made a mistake in giving his evidence, (d) or on account of the manner in which he has been sworn, (e) or of an objection to his competency discovered after the trial. (g)

(a) 1 Wils. 98; 1 Black. R. 298; 2 Black. R. 802, 803; 1 Term R. 84; 2 Term R. 113; 1 Price, 143; 11 Price, 383; *sed vide* 8 Taunt. 730; 3 Moo. 58. (b) 2 Atk. 319; 2 Chitt. R. 194; 2 Moo. 179; 8 Taunt. 236; 8 Moo. 32; 2 Chitt. R. 194, 267; 1 Bing. 339; 8 Moo. 612; but see 2 Chitt. R. 269, 271. (c) 4 Bing. 171. (d) Say. R. 27; M'Clel. 179; but see 5 Taunt. 277; 7 Moo. 546; 1 Bing. 145. (e) 7 Moo. 36; 3 Brod. & B. 232. (g) 1 Term R. 717; 1 Bos. & Pul. 429 (a); Tidd, 907, (9th ed.)

At the trial of a cause, a matter was mentioned by the judge before whom it was tried, the consequence of which, if it had been relied upon, must have been a verdict for the defendant. Instead of relying upon this, the defendant's counsel put his defence upon another matter, and there was a verdict for the plaintiff. A new trial being moved for, it was refused. And by the court—The act of a counsel in a cause is to be considered as the act of his client: and consequently, if the counsel waive a thing which would have been in favour of his client, it is the same thing as if the client himself waive it. The mistake of the judge or the jury is a good reason for granting a new trial; but the mistake of a counsel is not.

10 Mod. 202, 203, Reg. v. The Corp. of Helston. [That a mistake in conducting a cause, is no ground for a new trial, see Vernon v. Hankey, 2 Term R. 120; Spong v. Hog, 2 Bl. R. 802.] {Vide 2 East, 314, Wilson v. Hodges; 3 East, 222, Henry v. Adey; 8 East, 550, Gordon v. Secretan; 1 Johns. Ca. 495, Le Guen v. Gouverneur and Kemble; 1 Johns. Rep. 535, 555, 576, Bebee v. Bank of New York; 2 Mass T. Rep. 112, Morgan v. Bliss;} ||*sed vide* Ritchie v. Bousfield, 7 Taunt. 309.||

||If the leading counsel at *nisi prius* takes one line of case, contrary to the opinion of his junior, the court will not permit the junior counsel to obtain a new trial upon the ground that he was prepared with evidence to support another line of case which his leader repudiated.

Pickering v. Dowson, 4 Taunt. 779.||

[But the discovery of new evidence by an attorney of an executor defendant then absent from England, though in the actual custody of the attorney himself, but not known by him so to be, hath been admitted as a sufficient ground for a new trial.

Broadhead v. Marshall, 2 Bl. R. 955.] {See 2 Binn. 582, Knox v. Work, and Aubel v. Ealer.}

β A new trial is never granted for a defect in pleading.

Jordan v. James, 5 Ohio, 88; Dwyer v. Brannon, 6 Mass. 330.γ

6. On account of a Neglect, Mistake, or Fault of one of the Parties, or one of his Witnesses, β or because the Party has discovered new evidence.γ

β § 1. On account of a Neglect, Mistake, Fault of one of the Parties, or one of his Witnesses.

That the defendant did not know on what day the cause would be tried is no reason for a new trial.

Brevard v. Graham, 2 Bibb, 177.γ

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A new trial being moved for, because a witness of the party moving for it did not appear at the trial, it was refused. And by the court—If a new trial were to be granted on this account, one may be granted in almost every case; for it will be always in the power of a party to prevail upon one of his witnesses to be absent, on purpose to make his absence a ground for obtaining a new trial.

1 Ventr. 30, *Cotton v. Daintry*.

Upon a motion for a new trial, the party moving for it offered an affidavit, that one of his material witnesses did not appear at the trial. The court would not suffer the affidavit to be read.

1 Barn. 322, *Wheeler v. Pitt*.

If the appearance at the trial of a material witness for one party were prevented by a contrivance of the other party, as by arresting the witness, this is a reason for granting a new trial.

11 Mod. 141, *Davis v. Daverell*.

If the appearance at the trial of a material witness were prevented by a sudden illness, this is a reason for granting a new trial.

11 Mod. 1; 6 Mod. 22.

As a general rule, where a party has been unable to present his case to the jury, the court will allow him another hearing upon equitable terms.

Schlencker v. Risley, 3 Scamm. 485.

The court refused to grant a new trial, because a material witness did not appear at the trial, unless the witness would make an affidavit of what he knew concerning the matter in question; that the court might judge of the materiality of his evidence.

Salk. 645, *Anon.*

And so the court refused to grant a new trial on the ground that a witness who refused to release an interest, which rendered him incompetent, had mistaken the effect of the release, and was now ready to execute it.

Kellen v. Bennett, 4 Bing. 171.

It is said that a court of equity will grant a new trial, if it appear that a witness, upon whose testimony the verdict was principally founded, stands convicted of an infamous crime.

Prec. in Ch. 194, *Tovey v. Young*.

But it has been holden, that this is not a reason for granting a new trial. And by the court—If the record of the conviction of such a witness had been produced at the trial, the judge would not have admitted his testimony. As this was not done, the party who neglected to produce it ought to suffer for his neglect.

Salk. 653, *Ford v. Tilly*; 12 Mod. 584.

[Although an objection to the competency of a witness discovered after the trial is not, of itself, a sufficient ground for granting a new trial, yet it may have some weight with the court where the party applying appears to have merits.

Turner v. Pearte, 1 Term R. 717. [See 1 Bos. & Pul. 429 a; 4 Bing. 171.]

If it appear that the witnesses, upon whose testimony the former verdict was given, were suborned, the court will grant a new trial.

Fabrilus v. Cock, 3 Burr. 1771.]

And if the testimony of witnesses on which the verdict proceeded de-

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rive its credit from particular circumstances, and those circumstances be afterwards clearly falsified on affidavit, the Court of Common Pleas will grant a new trial.

Lister v. Mundell, 1 Bos. & P. 427. Vide 4 Taunt. 640; 4 Maul. & S. 140; Tidd's Prac. 914.

But, in general, the finding of a bill of indictment for perjury or conspiracy, is no ground for staying the proceedings before conviction, it being found on *ex parte* evidence.

4 Maul. & S. 140; 2 Price, 3; 2 Moo. 80; 8 Taunt. 182; 1 Bing. 329; 8 Moo. 612; 4 Bing. 562.

And the court will not grant a new trial on the mere affidavit of one party contradicting the witnesses on the other side.

4 Taunt. 640; 9 Moo. 581; and see 9 Price, 89; Tidd, 907, (9th ed.)||

A new trial being moved for, upon an affidavit that a material witness had made a mistake in giving his evidence at the trial, it was refused. And by the court—It would be of the most dangerous consequence to set aside a verdict, because a witness has from inattention, or from the want of being prepared, made a mistake in giving his evidence.

Sayer, 28, *Huish v. Sheldon*; {2 Cain. 129, 132, *Steinbach v. Columbian Ins. Co.*; 2 Cain. Er. 161, S. C.;} ||*sed vide contrd*, 5 Taunt. 277; 7 Moo. 546; 1 Bing. 145.||

β When every reasonable diligence has been employed by a defendant to prepare for trial, but he has been unable to attend himself on account of sickness, and an important witness had left the country before the trial, and other circumstances are laid before the court exonerating the party from laches, and showing a real and equitable defence, and the merits of the case not having been investigated, the court will grant a new trial.

Shirrard v. Gardner, 1 Halst. 344.γ

It is in one case laid down, that embracery is a good reason for granting a new trial, but that maintenance is not.

11 Mod. 118, *Lady Herbert v. Shaw*.

β Where the prevailing party has tampered with the jury, a new trial will be granted.

Wright's ex'rs v. Wright's Heirs, 1 Car. Law Repos. 363; *Perkins v. Knight*, 2 N. H. Rep. 474. See *Knight v. Freeport*, 13 Mass. 218.

A rule for a new trial will not be granted on affidavits alleging that a material witness has been prevented from attending the trial, without showing grounds for a belief that the successful party is implicated in such misconduct; it is not sufficient to state merely a belief that the witness has been kept away at his instance.

Marsh v. Monckton, 1 Tyr. & G. 34.

If a witness who is necessary to the plaintiff's case is not sent for in time, owing to the fraudulent management of the defendant's attorney in negotiating till too late for the plaintiff to procure his attendance at the assizes, the plaintiff should apply to the judge at *nisi prius* to put off the trial, and, if refused, should withdraw the record; but he must not take his chance of success, for if nonsuited the court will not grant a new trial.

Tarquand v. Dawson, 1 C. M. & R. 709; 5 Tyr. 488.γ

Upon a motion for a new trial it appeared that the plaintiff's attorney had written letters to two persons upon the panel, importuning them to appear, and setting forth the hardships his client had suffered. A new trial was granted, and the attorney, who was committed for having been

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guilty of embracery, was obliged to pay ten pounds to the other party by way of costs, before the court would consent to his being discharged.

2 Ventr. 173, Anon., Pasch. 3 W. 3.

It was in a subsequent case holden, that although one of the parties have desired a person to appear as a juryman, this is not a good reason for granting a new trial.

Stra. 643, Snell v. Timbrel, Mich. 12 G. 1.

The latter case is said to have been determined upon the authority of the case of Lady Herbert v. Shaw. But the case alluded to does not seem to warrant the determination.

Stra. 643, Snell v. Timbrel, Mich. 12 G. 1.

In that case the Duke of Leeds had written letters to all the persons upon the panel; every one of which letters, after desiring the person to appear at the trial, concluded with these words, "Which I shall take as a great obligation, and shall be glad of an occasion to show you how much I am, Sir, your humble servant." A new trial being moved for on account of these letters, it was refused upon the particular circumstances of the case; namely, that the defendant, who had had notice long before the trial of these letters, did not move for a trial at the bar, which the plaintiff had offered to consent to: but it was said by the court, that a letter of this kind is of the most dangerous consequence, it being a temptation to a juryman to be partial.

11 Mod. 119, Lady Herbert v. Shaw.

|| Where it was sworn that handbills reflecting on the plaintiff's character had been distributed in court, and shown to the jury on the trial, the court granted a new trial, and would not receive from the jury affidavits in contradiction, though the defendant denied all knowledge of the handbills.

3 Brod. & B. 272; 7 Moo. 87, S. C.||

§ If a party obtain a verdict and judgment by fraud or trick, the proper remedy is a motion for a new trial; but if not discovered in proper time to make such motion, an application must be made to the chancellor for a new trial.

Ryle v. Howlet, 3 Bibb, 347.g

A new trial was moved for; because the plaintiff, in whose favour the verdict was, had, after it was brought in, given to every one of the jurors four pounds; whereas by a rule of the court they were entitled to no more than twenty shillings each. The court being equally divided, no rule could be made. Morton, J., and Rainsford, J., were of opinion, that although the plaintiff may be punishable for disobedience to the rule of the court, there was no reason for granting a new trial. Keeling, C. J., and Twisden, J., were of opinion, that a new trial ought to be granted; for that, if either party may give what he pleases to the jurors after the verdict is brought in, the jurors will be frequently inclined to find a verdict for that party who is best able to reward them.

1 Ventr. 30, Cotton v. Daintry.

§ 2. Because the Party has discovered new Evidence.g

It is in divers cases laid down, that a new trial ought not to be granted, because the party who moves for it was not at the trial furnished with evidence, which it was in his power to have been furnished with.

Salk. 273, 647, 653; Prec. in Ch. 194; Str. 691; [Gist v. Mason, 1 Term R. 84.]

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||But in an action on a policy, where the defendant, by mistake of his witness, failed in producing a necessary document from the Admiralty, the Court of Common Pleas granted a new trial, in order to let in this evidence after a verdict for the plaintiff on the merits.

D'Aguilar v. Tobin, 2 Marsh. 265.||

It is said in one case, that if material evidence, of which the party had no knowledge at the trial, be afterwards discovered, this is a reason for granting a new trial: but it may be inferred, from what is laid down in a modern case, that this case is not law.

12 Mod. 584. β New trials are now granted on the ground of newly discovered evidence, but with the following restrictions: 1. The testimony must have been discovered since the former trial; 2. The party must have used due diligence to procure it on the former trial; 3. It must be material to the issue; 4. It must go to the merits of the cause, and not merely impeach the character of a witness; 5. It must not be merely cumulative. The People v. The Superior Court of New York, 10 Wend. 291; Rowley v. Kinney, 14 Johns. 186; Pike v. Evans, 15 Johns. 132; Guyott v. Butts, 4 Wend. 579; Moore v. Philadelphia Bank, 5 Serg. & Rawle, 41; Bond v. Cutler, 7 Mass. 205; Evans v. Rogers, 2 Nott & M'Cord, 563; Stone v. Clifford, 5 Lou. R. 11; Nichols v. Alsop, 11 Lou. R. 409; Gravier's curator v. Rapp, 12 Lou. R. 162; Drayton v. Thompson, 1 Bay. 263; Jones v. Lollicoffer, 2 Hawks, 492; Smith v. Shultz, 1 Scam. 491; Schlencker v. Risley, 3 Scam. 487; Knox v. Work, 2 Binn. 582; Aubel v. Ealer, 2 Binn. 582, n.; Turnbull v. O'Hara, 4 Yeates, 446; Waln v. Wilkins, 4 Yeates, 461.¶

In an action for criminal conversation with the plaintiff's wife, there was a verdict for the plaintiff with 1000*l.* damages. A new trial was moved for, upon an affidavit of its having been discovered since the trial, that the woman was not the wife of the plaintiff. It was refused. And by the court—It is an established rule, that a new trial ought not to be granted upon the account of evidence discovered after the trial, which by using due diligence might have been discovered before. It is laid down in divers cases, that the court will not grant a new trial, because one of the parties was not at the trial prepared to make out his case. It would be of the most dangerous consequence to suffer one party, after he has heard the evidence of the other, to give new evidence. In the present case the defendant ought to have been prepared at the trial to have proved that the woman was not the plaintiff's wife; which was the very gist of the action.

MS. Rep. Walker v. Scott, Mich. 23 G. 2, in B. R. {A new trial may be granted on account of the discovery of new and material testimony, of which the party was not before apprized, and which he could not by due diligence have obtained. What the new testimony is, must be stated, that the court may judge of the materiality of it. 1 Johns. Ca. 402, Doe v. Roe; Ibid. 494, Le Guen v. Gouverneur & Kemble; 1 Cain. 24, Hasley v. Watson; 2 Cain. 72, Kendrick v. Delafield; Ibid. 163, Vandervoort v. Columbian Ins. Co.; Ibid. 260, Pomroy v. The same; 3 Cain. 186, Hollingsworth v. Napier; Ibid. 307, Palmer v. Mulligan; 1 Johns. Rep. 59, Richardson v. Backus; 3 Johns. Rep. 307, Richards v. Marine Ins. Co.; 2 Binn. 582, Knox v. Work, and Aubel v. Ealer; 1 Bay. 263, Drayton v. Thompson; Ibid. 491, The State v. Gordon. And a new trial will not be granted if the evidence discovered is other witnesses to the same facts; 2 Cain. 129, 133, Steinbach v. Columbian Ins. Co.; 2 Cain. Er. 162, S. C.; or if it goes only to impeach the credit of a witness sworn at the trial. 3 Johns. Rep. 255, Bunn v. Hoyt; 4 Johns. Rep. 425, Shumway v. Fowler; 5 Johns. Rep. 248, Duryee v. Dennison; } ||sed vide 2 Black. R. 955; 7 Taunt. 309; 8 Taunt. 730; 3 Moo. 58, S. C.; and see Tidd, 906, (9th ed.)||

β A new trial will not be granted when the newly discovered evidence goes merely in mitigation of damages.

Schlencker v. Risley, 3 Scam. 487.

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Motions for new trials on the ground of newly discovered evidence have uniformly been overruled, if, upon using due diligence, the evidence might have been discovered before.

Goe v. Givan, 1 Blackf. 367; *Lester v. The State*, 11 Conn. 415; *Wilbor v. M'Gullicuddy*, 3 Lo. R. 383; *Rawle v. Skipwith*, 8 Mart. N. S. 593.

The names of the witnesses, and the nature of the evidence newly discovered, should be disclosed in an application for a new trial.

André v. Bienvenu, 1 Mart. Lo. R. 148; *Locard v. Bullitt*, 3 Mart. N. S. 170.

A new trial will not be granted on the ground of the discovery of a paper which will prove a payment, when that fact is not pleaded in the answer, which, on the contrary, denies the existence of any such contract as the one sued on.

Sorrel v. St. Julien, 4 Mart. Lo. R. 512.

A new trial will not be granted on the late discovery of evidence, to be obtained from the opposite party by interrogatories.

Muirhead v. M'Micken, 10 Mart. Lo. R. 83; *Rhodes v. Beaman*, 10 Lo. R. 371.

A party who asks for a new trial on the ground of newly discovered evidence, must show not only the previous use of due diligence, but also that the evidence is competent and material.

Ingram v. Croft, 7 Lo. R. 84.

A new trial should not be granted on an affidavit of newly discovered evidence since the trial, where the facts disclosed related to matters which had not been pleaded.

Cox v. Bethany, 10 Lo. R. 155.

A new trial will not be granted, when the party applying for it has not used due diligence to procure the necessary evidence.

Stafford v. Culliham, 3 Mart. N. S. 124; *Hernandez v. Garetage*, 4 Mart. N. S. 419; *Innis v. Ware*, 1 Mart. N. S. 643; *Findley v. Nancy*, 3 Monr. R. 403; *Ditto v. The Commonwealth*, 2 Bibb, 18; *The People v. Superior Court*, 5 Wend. 114; *Jackson ex dem. Malin v. Malin*, 15 Johns. 293; *Williams v. Baldwin*, 18 Johns. 489; *Vandervoort v. Smith*, 2 Caines, 155; *Hollingsworth v. Napier*, 3 Caines, 182; *Palmer v. Mulligan*, 3 Caines, 307.

Upon a motion for a new trial on account of the discovery of evidence unknown at the former trial, the evidence discovered must be disclosed.

Adams v. Ashley, 2 Bibb, 287.

During the trial of the case a man declares to a bystander that he knows more of the subject-matter in controversy than any of the witnesses examined, and leaves the court before a subpoena can be served on him. This is no good ground for a new trial.

Lester v. Goode, 2 Murph. 37.

A new trial will be granted on a feigned issue out of Chancery, on an affidavit of newly discovered evidence.

Doe v. Roe, 1 Johns. Cas. 402.

Even in a criminal case, a new trial will not be granted because the district attorney, by mistake, withholds in his hands papers important to the defendant, unless the latter uses due diligence to obtain them. Where the district attorney told him, by mistake, they were in the hands of C, who, on being applied to, answered they were with the district attorney; the defendant did not explain the mistake nor apply to the district attorney again. Held, a want of due diligence, and a new trial refused.

The People v. Vermilyea, 7 Cowen, 369.

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When the newly discovered evidence is merely cumulative, it is not sufficient ground for granting a new trial.

Wheelwright v. Beers, 2 Hall, 391 ; The People v. Superior Court, 10 Wend. 285 ; Smith v. Brush, 8 Johns. R. 84 ; Pike v. Evans, 15 Johns. R. 210 ; Steinbach v. Col. Ins. Co., 2 Caines, 129 ; Guiot v. Butts, 4 Wend. 579.

§ 3. When the party was taken by surprise.

When a deposition was excluded, upon an exception filed after the jury were sworn, because it was taken upon a *dedimus* irregularly issued, the court granted a new trial for the surprise.

Thompson v. Porter, Lit. Sel. Cas. 194.

It is no ground for a new trial that the party had reason to believe, and did believe, that the opposite party would produce a copy of a record, which would have been material in evidence to him who alleges the surprise, and which was not produced.

Chiles v. Dedman, 3 Marsh. 464.

Surprise, occasioned by the swearing of a witness to facts, which the party against whom he was called would not suppose or believe he would swear, will be sufficient ground on which to grant a new trial.

Millar v. Field, 3 Marsh. 109.

If a party call his adversary's witness, he will make him his own, and will not be heard to allege surprise at his testimony.

Higden v. Higden, 2 Marsh. 42.

When a party alleges surprise he must show that there were reasonable grounds for surprise.

Lee v. Banks, 4 Lit. R. 11. See Holmes v. M'Kinney, 4 Monr. R. 5.

A new trial will be granted on the ground of surprise in matter of law, when the question is really a doubtful one.

Welborn v. Younger, 3 Hawks, 305.

A new trial for surprise can be granted only in the court where the trial was had.

Lindsay v. Lee, 1 Dev. 464.

A new trial will not be granted on the ground of surprise, where the plaintiff is not permitted to read depositions, because the deponent is security for costs.

Arrington's Adm'r v. Coleman, 2 Hayw. 300. See Thompson v. Thompson, 2 Hayw. 405.

The mere stating that the plaintiff was surprised, is not sufficient to authorize the court to open a cause after trial. The court ought to be satisfied that there was surprise, either from what appears in the affidavit or otherwise. The affidavit is not conclusive as to the fact of surprise.

Howell v. Cheatham, Cooke's R. 247.

When a defendant moves for a new trial on the ground of surprise, his affidavit should state the particulars of the defence he is to set up, and that should be supported by indifferent testimony.

Hammonds v. Kemer et ux., 3 Hayw. 145.

A new trial will be granted on the ground of surprise where the attorney of one of the parties had in his possession a deed important to the rights of the other party, and, before trial, delivered it to a third person, without

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apprizing his adversary, who subpoenaed the attorney, and also gave him notice to produce the deed, and, on the trial, first learned it was not in his possession.

Jackson v. Warford, 7 Wend. 62.

On an application by a defendant, for a new trial, on the ground of surprise, if the defence intended to be set up do not otherwise appear, it must be shown by affidavit, that the counsel believes, or that the party believes, on the advice of counsel, that it is a good and valid one.

Dow v. Heinsburgh, 1 Aik. 35.

To entitle a party to a new trial on the ground of surprise, it must appear not only that he is surprised, but that he is injured, and also how he can obviate the difficulty in which the surprise consisted.

Blake v. Howe, 1 Aik. 306.

A new trial on the ground of surprise will not be granted when it appears that the surprise was not occasioned by the defendant's testimony, but because the judge required other evidence than what the plaintiff had thought sufficient.

Morgan v. Blise, 2 Mass. 112.

A new trial was granted where the plaintiff was surprised at the trial, by an allegation sworn to by two witnesses, who were, with reason, suspected of perjury.

Peterson v. Barry, 4 Binn. 481.

A new trial will not be granted, if the amount in controversy, arising from a surprise at the trial, is so small as not to exceed the costs of the parties, of another trial.

Bitting v. Mowry, 1 Miles, 216.g

7. In an Action of Ejectment, & and a Writ of Right.

It is laid down in divers cases that the court will not grant a new trial in an action of ejectment; because another action of ejectment may be brought, and, consequently, there is no necessity for granting a new trial.

1 Jon. 225; Salk. 648, 650; Ld. Raym. 514.

And in one case it is said that the court will not grant a new trial in an action of ejectment, unless the case be so circumstanced that justice cannot otherwise be attained.

Stra. 1106, Dormer v. Parkhurst, Hil. 12 G. 2.

But these cases do not seem to be law; for in one modern case it is said, that the court will not grant a new trial in an action of ejectment, where the verdict is for the defendant; from whence it may fairly be inferred, that where the verdict is for the plaintiff a new trial may be granted.

1 Barn. 323, *Brown v. Petcher*, Mich. 8 G. 2.

And in a very modern case it is expressly laid down, that where the verdict is for the plaintiff the court will grant a new trial as readily in an action of ejectment as in any other action. A motion being made for a new trial in an action of ejectment, it was refused upon the particular circumstances of the case. But by Lord Mansfield, C. J.—It is not true that the court will not in any case grant a new trial as readily in an action of ejectment as in any other action. If the verdict be for the defendant, the

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court will not grant a new trial but for very particular reasons; because, as the verdict in an action of ejectment is not conclusive, the plaintiff may bring another action of ejectment: but, where the verdict is for the plaintiff, the court will grant a new trial as readily in an action of ejectment as in any other action, and the court ought so to do; for if the possession should be changed in consequence of the verdict, it would sometimes answer no purpose for the party who has lost the possession, which was perhaps his only title, to be at liberty to bring another action of ejectment.

MS. Rep. Wright on the dem. of Clymer v. Littler, Mich. 2 G. 3, in B. R.; [1 Bl. R. 345, S. C.] ||See Tidd, 1240, (9th ed.)||

¶ In ejectment, after a verdict for the defendant, a new trial is seldom granted; the plaintiff may as well begin anew as to pay the costs of a new trial.

6 Ohio, 255.

In ejectment, a new trial will not be granted because the plaintiff gave evidence of title to an undivided moiety only, but a general verdict was taken.

Jackson ex dem. Moore v. Van Bergen, 1 Johns. Cas. 101.

A new trial in ejectment, after a trial at bar by a special jury and verdict for the defendant, will not be granted.

Den v. Vancleve, 2 South. 589.

In ejectment, a new trial will be granted in favour of the plaintiff, when the verdict is founded on a mistake or produces injustice.

Deems v. Quarrier, 3 Rand. 475.

Where several actions of ejectment were consolidated into one, and evidence was admitted which was incompetent as to one tenant, and competent as to the others, and a general verdict was rendered in favour of the plaintiff; the court refused to give judgment, and granted a new trial.

Stewart v. Johnson, 3 Harr. 46.

In ejectment, where there has been a view and a variety of evidence, a new trial will not be granted, without strong and special circumstances.

Leach v. Armitage, 1 Yeates, 104.

A new trial will be granted in a writ of right, as well as in any other action, when the verdict is against law and evidence.

Bradstreet v. Clarke, 12 Wend. 602.

8. In a Penal Action.

In an action for the penalty given for killing a hare, the jury, contrary to the direction of the judge before whom the cause was tried, found a verdict for the defendant. A new trial being moved for, it was refused on account of the action being penal.

Stra. 899, Seymour *qui tam* v. Day.

In an action for the penalty given for selling less than two gallons of spirituous liquors, the fact was proved; and Eyre, C. J., before whom the cause was tried, directed the jury to find a verdict for the plaintiff. Notwithstanding this direction, a verdict was found for the defendant; yet a new trial was refused.

1 Barn. 316, Phillips *qui tam* v. Scullard.

In an action for the penalty given for a fraudulent exportation of Jesuits' bark, the verdict was for the defendant. A motion being made for a new

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trial, it was refused. The reporter of this case, after saying it seemed to be admitted that a new trial may upon the particular circumstances of the case be granted in a penal action, adds, that the counsel for the plaintiff were prepared with precedents in which it had been done : but he does not mention where any such precedent is to be met with, and the contrary is laid down in a subsequent case.

Bunb. 253, *Robinson qui tam v. Lequesne*, Trin. 1 G. 2.

An action being brought for the penalty given by the statute against horse-racing, the jury found a verdict for the defendant. The verdict being contrary to evidence, a new trial was moved for, but was refused. And by the court—As there does not appear to have been any unfair practice of the defendant, this case is within the reason of the practice of the Court of Exchequer, in which court a new trial is never granted at the instance of the plaintiff in an action for a penalty, unless the defendant have been guilty of unfair practice.

Stra. 1238, *Matthison qui tam v. Allanson*, Mich. 18 G. 2.

[But a new trial will be granted in a penal action even after a verdict for the defendant, if such verdict has proceeded upon the mistake of the judge.

Wilson v. Rastall, 4 Term R. 753; *Calcraft v. Gibbs*, 5 Term R. 19.] [Acc. *Brook q. t. v. Middleton*, 10 East, 268; *Rex v. Mann*, 4 Maul. & S. 338; *Lord Selica v. Powell*, 6 Taunt. 297; and see *Tidd*, 910, (9th ed.) and cases there cited.]

§ In an inquisition of forcible detainer, the proceeding being of a civil nature, the court will grant a new trial, if the jury find contrary to the evidence.

Adams's Ex'r v. Robeson, 1 Murph. 392.

In an action of slander, where the jury have found in favour of the defendant, the court may grant a new trial.

Horton v. Reavis, 2 Car. Law Repos. 276; *Johnson v. Scribner*, 6 Conn. 185.

In an action *qui tam* against two partners for the penalty incurred for selling goods without a license; after verdict for the defendants, a new trial may be granted as to the party guilty of selling, and judgment be entered as to the other partner.

Martin qui tam v. M'Night, 1 Tenn. 330.

In such case, the only grounds for granting a new trial are either misdirection of the court as to matter of law, or fraud, or improper practices by the defendant in producing the verdict.

1 Tenn. 330. See *Crafts v. Plumb*, 11 Wend. 143.

In a penal action, a new trial will be granted only in two cases : 1, when the verdict is founded on a mistake of the court on the law, in their direction to the jury ; 2, when the verdict has been procured by the fraud or practice of the defendant.

Martin v. M'Night, 1 Tenn. 330.

In a civil action brought to recover a pecuniary penalty, the court has full power to grant a new trial, though the verdict was in favour of the defendant.

United States v. Halberstadt, Gilp. 262.g

9. In an Indictment or Information.

If the defendant in an indictment or information have been acquitted,

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the court will not grant a new trial, notwithstanding the verdict were contrary to evidence.

1 Sid. 154; 1 Lev. 124; Ld. Raym. 63; 12 Mod. 98. ||*Acc.* Rex v. Raynall, 6 East, 315; Rex v. Mann, 4 Maul. & S. 337; Rex v. Inhab. of Wandsworth, 1 Barn. & A. 63; 2 Chitt. R. 282; and the rule is the same though the acquittal was founded on a misdirection of the judge. 1 Stark. Ca. 516.||

β According to the Constitution of the United States, “no fact once tried by a jury shall be otherwise re-examined than according to the rules of the common law,” therefore there can be no trial in capital cases, after a regular trial once had upon a sufficient indictment.

United States v. Gibert, 2 Sumn. 19.

A new trial will not be granted in a criminal case, after a verdict for the defendant.

State v. De Hart, 2 Hals. 172.g

||But where the defendant was acquitted on an indictment for not repairing a road, though the court would not grant a new trial, yet, under very special circumstances, they superseded the entry of the judgment, so as to enable the parties to have the question reconsidered upon another indictment, without the prejudice of the former judgment.

Rex v. Wandsworth, 1 Barn. & A. 63; *sed* vide 6 Maul. & S. 392.

And in a case of *quo warranto*, a new trial has been granted after verdict for the defendant against the weight of evidence.

2 Term R. 484; 6 East, 316, in notes; 4 Maul. & S. 338.||

A new trial being moved for, after an acquittal in an indictment for a libel, because the verdict was contrary to evidence, it was refused. And by the court—A new trial ought not to be granted after an acquittal in a criminal case, unless the defendant have been guilty of unfair practice.

Salk. 646, Rex v. Bear; β State v. Taylor, 1 Hawks, 462; State v. Martin, 3 Hawks, 381.g

The defendant in an information for a riot being acquitted, a new trial was refused, although the verdict was, in the opinion of the judge before whom the information was tried, contrary to evidence; because it did not appear that the verdict was obtained by unfair practice of the defendant.

1 Show. 336, Rex v. Davis; 12 Mod. 9.

The defendant in an information in the nature of a *quo warranto* being acquitted, a new trial was moved for, and the judge, before whom the information was tried, reported that the verdict was, in his opinion, contrary to evidence. The Court of King's Bench being equally divided in opinion whether a new trial could be granted after an acquittal in such information, the case was adjourned to be argued before all the judges, who being likewise equally divided in opinion, the rule to show cause why a new trial should not be granted was discharged.

Stra. 101, Rex v. Bennet.

A new trial was moved for, because the verdict, which was for the defendant in an information in the nature of a *quo warranto*, was contrary to evidence. The court refused to grant a rule to show cause. And by Lee, C. J.—In the case of the King v. Bennet the judges were equally divided in opinion, whether a new trial could in such case be granted; and in the case of the King v. Jones, which was in Trin. 12 G. 1, wherein the same question arose, a new trial was not granted, the court being equally divided in opinion upon the question.

Sayer, 102, Rex v. Blunt; [*sed* vide *contra*, Rex v. Francis, 2 Term R. 484.]

(A) Of an Action of Trover in the general.

in subserviency to the purposes of the person in whom the general or absolute property is vested, the right to the possession must necessarily remain in such person; or rather, the possession of the servant, for so we may consider the special proprietor, is in law the possession of the master or real owner. The action then being founded upon a conjunct right of property and possession, any act of a defendant which negatives, or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use, though such be the allegation in the declaration. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use. Hence a re-delivery of the thing will not protect him from the action. Hence nothing can be pleaded in bar of it, but matter *dehors* or unconnected with the transaction; such as a release, former recovery, and perhaps the statute of limitations.]

Divers things relative to an action of *trover*, as tender and bringing money into court, damages and costs, have been treated of under the titles "TENDER AND BRINGING MONEY INTO COURT," "DAMAGES," and "Costs."

The remaining matter which appertains to this title shall be ranged in the following order:

(A) Of an Action of Trover in the general.

(B) Of a Conversion: ¶And herein where a Demand and Refusal before Action are requisite.¶

(C) Who may bring an Action of Trover.

(D) For what Injuries an Action of Trover lies.

(E) Against whom an Action of Trover may be brought.

(F) Of the Pleadings in an Action of Trover.

1. *Of the Declaration.*

2. *Of the Plea.*

(G) Of Evidence in an Action of Trover.

β(H) Of the Verdict, Damages, and Judgment, in an Action of Trover. §

(A) Of an Action of Trover in the general.

If one person who has found the goods of another convert them, an action of trover lies.

If one person who came to the possession of the goods of another by delivery convert them, an action of trover lies; for although there be not in such case an actual finding, there is a finding in law, which is sufficient to found this action upon.

2 Bulstr. 313, *Isaac v. Clerk*. β Whenever an action of trespass *de bonis asportatis* lies, trover may be maintained. *Prescott v. Wright*, 6 Mass. 20; *Pierce v. Benjamin*, 14 Pick. 356. §

β In trover it is not indispensable that the defendant should have had possession.

Hall v. Amos, 5 Monr. 90.

A father gave to his son, a youth of sixteen years of age, some printed

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books, and several articles of wearing apparel. Held, that though the son was under age, the father could not maintain trover against a person who detained the property, because the right of possession was not in him but in the son.

Hunter v. Westbrook, 2 C. & P. 578.

Where one who has a general property in goods deliver them to his agent to keep for him, and the goods are taken out of the possession of the agent by third persons, the person having the general property may maintain trover for the goods against the person who took them.

Thorp v. Burling, 11 Johns. 285. *g*

If the goods of J S have been taken by J N in such a tortious manner that an action of trespass would lie, an action of trover will likewise lie; but J S can only recover in the latter action damages for the conversion of the goods, inasmuch as by electing to bring an action of trover, he waves his right to recover damages for the tortious taking.

Cro. Eliz. 824, Bishop v. Lady Montague; Clayt. 113; Cro. Ja. 50; Cro. Car. 89; 1 Mod. 31; Stra. 128.

Wherever an action of trover lies, an action of detinue will likewise lie. (*a*) But the latter action is very seldom brought; because the defendant may wage his law therein.

2 Roll. R. 447, Goodwin v. Harwood. [(*a*) The converse of this proposition would be nearer the truth, namely: that trover lies where detinue will lie. In detinue the specific chattel must be accurately described and traced; in trover this certainty in the description is not requisite: it is obvious, therefore, that trover may be brought where detinue could not be supported. The authority referred to, we may add, by no means establishes the author's proposition. See also 7 Term R. 12, 13.] *β* Hall v. Amos, 5 Monr. 90. *g*

There is another reason for preferring an action of trover to one of detinue; namely, that in the latter action the plaintiff can only recover the goods in *specie*, (*b*) whereas in the former he may recover damages for the conversion.

Cro. Ja. 130; 4 Roll. Abr. 5. [(*b*) It is not true that in detinue the plaintiff can only recover the goods in *specie*; the judgment may be for the *value* of the specific goods. Co. Entr. tit. *Detinue*.]

If the plaintiff in an action of trover have recovered damages for the conversion of goods, the property in the goods thereupon vests in the defendant; who, as damages to the value of the goods have been recovered against him, is to be considered as a purchaser.

Stra. 1078, Adams v. Broughton; [Andr. 18, S.C.; Kelw. 58 b, S. P., *per* Frowicke.] {But payment of damages for a trespass committed by cutting down trees does not transfer the property in the trees cut down. 5 Johns. Rep. 348, Betts and Church v. Lee.

(B) Of a Conversion: ||And herein where a Demand and Refusal before Action are requisite.||

EVERY assuming by one person to dispose of the goods of another as if they were his own, is a conversion.

6 Mod. 212; Clayt. 112.

If J S take the goods of J N unlawfully, this is a conversion; such taking being a disposing of the goods as if they were the goods of J S.

1 Sid. 264, Bruen v. Roe, Clayt. 112.

If one person dispose of the goods of another for the benefit of a third

(B) Of a Conversion, &c.

person, this is a conversion ; for the injury to the owner of the goods is the same as if they had been disposed of for the benefit of the disposer.

Sayer 41, Perkins v. Smith.

|| Thus a servant converting goods for the benefit of his master, may himself be charged in trover ; and this whether he has any authority or not from his master.

Stephens v. Elwall, 4 Maul. & S. 259 ; Perkins v. Smith, 1 Wils. 328.

If the goods of J S are delivered to J N by a person not having a lawful authority to deliver them, and J N sell them, it is equally a conversion as if J N had himself taken the goods.

Sayer, 41, Perkins v. Smith.

The severing of a thing from a freehold, as taking down the door of a house, is not a conversion ; for a conversion can only be of a personal chattel.

Cro. Ja. 129, Wood v. Smith. ¶ See Nelson v. Burt, 15 Mass. 204 ; Peterson v. Clark, 15 Johns. 205.

But if a thing which has been severed from a freehold be carried away, as if J S carry away a tree, the property of J N, which was cut down by himself or by any other person, this is a conversion.

Noy, 125, Skidness v. Hodson.

If J S dig coals in a pit of J N, and throw them out of the pit, he is guilty of a conversion ; because, as the coals after being dug were a personal chattel, throwing them out of the pit was a disposing of them as if they were the coals of J S.

1 Jon. 245, Player v. Roberts.

If J S, who came to the possession of the goods of J N by finding, lose them, or they be taken from him, J S is not guilty of a conversion ; because he does not in either case dispose of the goods as if they were his own.

1 Leon. 223, Vandrink v. Archer ; 1 Roll. Abr. 6, (L.) pl. 4 ; Bro. *Detin.* pl. 40.

If goods, in order to prevent a ship from sinking, are thrown by the master of the ship into the sea, this is not a conversion ; because, so far from disposing of the goods as if they were his own, the master only does what is necessary for the preservation of the ship, and the lives of the persons on board.

2 Bulstr. 280, Bird v. Astcock. ¶ See *antè*, Merchant and Merchandise, tit. *Average*.]

{ If the thing for which the action is brought, and which has been lost, was taken to do a work of charity, or to do a kindness to the party who owned it, and without any intention of injury to it, or of converting it to the defendant's own use, and, under any of these circumstances, any misfortune happened to the thing, it cannot be deemed an illegal conversion ; but as it would be a justification in an action of trespass, it would be a good answer to an action of trover.

Per Lord Ellenborough, 4 Esp. Rep. 165, Drake v. Shorter. }

If the goods of J S, which were illegally taken by J N, are retaken by J S, this is not a conversion ; it being lawful for J S to retake the goods.

Bro. *Tresp.* pl. 323 ; Cro. Eliz. 329.

If a stakeholder deliver money, deposited in his hands by A on account of a wager, to B, who won the wager, this is not a conversion ; for, as B

(B) Of a Conversion, &c.

has won the wager, the stakeholder does no more than deliver his own money to B.

Cro. Eliz. 870, *Ledesham v. Lenham*.

Every unlawful intermeddling by one person with the goods of another is a conversion, it being a disposing *pro tanto* of the goods of another as if they were the goods of the intermeddler.

Yelv. 194, *Gomersale v. Medgate*.

{A sale of a ship (which was afterwards lost at sea) made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without showing a demand and refusal.

5 East, 407, *Bloxam v. Hubbard*.}

If the horse of J S be taken and ridden by J N, this is a conversion, it being an unlawful intermeddling with the horse ; [and a re-delivery to J N will only go in mitigation of damages.]

1 Roll. Abr. 5, *Countess of Rutland's case* ; 6 Mod. 212 ; [Bull. N. P. 46 ;] ¶ *Wyatt v. Blades*, 3 Camp. 396.¶

§ A B hired a mare to ride from Nashville to Franklin and back ; upon his return, in addition to his own weight, he carried in his saddle-bags \$2000 in specie, weighing 160 pounds. Held, that this was not a conversion of the mare.

M'Neill v. Brooks, 1 Yerg. 73.¶

[If one man, who is intrusted with the goods of another, put them into the hands of a third person, contrary to orders, it is a conversion.

Per Buller, J., 4 Term R. 264.

If a person take my horse to ride, and leave him at an inn, that is a conversion ; for though I may have the horse on sending for him, and paying for the keeping of him, yet it brings a charge upon me.

Per Buller, J., 4 Term R. 264.

§ Driving a hired horse a greater distance than has been agreed on, or in a different direction, is a conversion.

Wheelock v. Wheelwright, 5 Mass. 104 ; *Homer v. Thwing*, 3 Pick. 492.¶

Where the owner of goods on board a vessel directed the captain not to land them on a particular wharf, to which the latter agreed at the time, but afterwards disobeyed the orders, and delivered the goods into the possession of the wharfinger, under an idea of the wharfinger's having a lien thereon for wharfage fees, this was adjudged a conversion, for by putting these goods on the wharf he brought a charge upon the owner.

Syeds v. Hay, 4 Term R. 260.]

{When a carrier loses goods by accident, trover will not {} lie against him ; but when he delivers them to a third person, and is an actor, though under a *mistake*, this species of action may be maintained.

Peake, N. P. 49, *Youl v. Harbottle*. {} 5 Burr. 2825, *Ross v. Johnson* ; and see 4 Esp. Rep. 156, *Severin v. Keppell*.

A intrusted B with goods to sell in India, agreeing to take back from B what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get if he could not obtain that price. B not being able to sell the goods in India himself, left them with an agent to be disposed of by him, directing

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the agent to remit the money to himself (B) in England. It was held that A (even if entitled to *any* action) could not maintain *trover* against B for the goods, as the conduct of B did not amount to a conversion. Mere negligence is not sufficient to support this action; and the conduct of the defendant in not selling the goods in India was a mere non-feasance. To support an action of trover there must be a positive tortious act. The defendant was at liberty, by the terms of the agreement, as it did not express that he should sell the goods himself, to leave them with his agent to be sold.

2 Bos. & Pul. 438, *Bromley v. Coxwell*; 6 East, 540.}

If J S, who lawfully distrained a beast, work it, this is a conversion; because the working of the beast is an unlawful intermeddling therewith.

Cro. Ja. 148, *Bagshaw v. Goward*; Brownl. 5.

But if J S, after having lawfully distrained a milch cow belonging to J N, milk it, this is not a conversion; for as milking the cow, which prevents it from being spoiled, is for the benefit of J N, it is lawful to milk it.

Cro. Ja. 148, *Bagshaw v. Goward*.

If J S, who lawfully distrained a beast, impound it in a proper pound, this is not a conversion; because he does nothing more than put the beast into the custody of the law.

2 Mod. 244.

If J S, after having lawfully distrained goods for rent in arrear, had heretofore sold them, this would have been a conversion.

Cro. Ja. 148, 225; Yelv. 194.

But by the 2 W. & M. c. 5, § 1, it is enacted, "That where goods are distrained for rent due upon a demise, lease, or contract, the person distraining may cause the goods to be sold."

If a person, who found apparel, or to whom apparel was delivered to be kept, wear it, this is a conversion; the wearing of the apparel being an unlawful intermeddling therewith.

1 Leon. 224, *Waldgrave v. Ogden*; Cro. Eliz. 219.

But if such apparel be eaten by moths, this, notwithstanding the injury was owing to negligence in keeping the apparel, is not a conversion; because the injury does not arise from a malfeasance.

1 Leon. 224, *Waldgrave v. Ogden*; Cro. Eliz. 219; 2 Bulstr. 312.

There is, indeed, some doubt whether an action upon the case does lie in such case against the person who found the apparel; for it is laid down in divers books, that the person who came to the possession of the goods of another by finding, is not obliged to take so much care of them as if he had come to the possession thereof by delivery.

Bro. *Detin.* pl. 40; 1 Leon. 223, 224; Owen, 141; Cro. Eliz. 219.

But it is in one book laid down, that an action upon the case lies for negligence in keeping goods which were found; inasmuch as it is the duty of the finder of goods to keep them safely for the owner.

2 Bulstr. 312, *Isaac v. Clark*.

If the corn of J N be carried by J S to a mill, and the miller, after being forbidden so to do by J N, grind it, this is a conversion: the grinding of the corn being an unlawful intermeddling therewith.

Clayt. 57, *Holsworth's case*.

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If one man, after drawing part of the wine of another out of a vessel, put as much water into the vessel as he drew out wine, this is a conversion of all the wine ; because the whole is thereby damaged, if not spoiled.

Stra. 576, *Richardson v. Atkinson* ; *Dench v. Walker*, 14 Mass. 500, *acc.* See *Young v. Mason*, 8 Pick. 551.

A master of a ship, who had contracted with a seaman to go a voyage, after the seaman came on board refused to pay him according to the contract. Hereupon the seaman desired to carry away some goods which he had brought on board with him. The master would not permit him to do this, and said he should not carry them away until he had examined them, which he refused to do at that time. This was holden to be a conversion.

12 Mod. 344, Anon.

If J S, who came to the possession of goods, the property of J N, by finding, do not absolutely refuse to deliver the goods to J N, and only say, that he does not know whether J N be the owner of them, this is not a conversion.

2 Bulstr. 312, *Isaac v. Clark* ; {1 Esp. Rep. 83, *Solomons v. Dawes* ; 2 Bos. & Pul. 464 ;} *acc.* 3 Camp. 215, n., and *post.*

||A had sued B in trespass for taking a filly ; B justified that the filly belonged to C, his brother, and that he took it by his command. A verdict was taken for A, with 25*l.* damages, subject to an award by D, to whom the filly was delivered by consent, in order that he might determine, when it shed its coat, whether it was marked with a certain scar or not ; if it was, the verdict was to stand ; if not, the verdict was to be returned for B. D made his award, stating that the scar appeared, and ordering the verdict for A to stand ; upon which C demanded the filly of D, the arbitrator, and brought trover for it on his refusal. The court held, that the detention was no conversion by the arbitrator, since it clearly appeared the filly did not belong to C ; and the demand was not made in the name of B, who was entitled to it rather than C, since he would have to pay the damages for taking it under the award.

Gurton v. Nurse, 2 Bro. & B. 447.

A piece of timber, the property of J S, being in the field of J N, J S asked leave to fetch it away. J N refused to give leave, but never intermeddled therewith. It was holden, that as J N never intermeddled with the piece of timber, his refusal of leave to fetch it away was not a conversion.

2 Bulstr. 310, *Isaac v. Clark* ; 2 Mod. 245.

{Taking the property of another by assignment from one who had no authority to dispose of it is a conversion.

6 East, 538, *M'Combie v. Davis*.}

Upon the Custom-house quay there is a hut, wherein certain porters lodge goods, until the ships, in which the goods are to be put on board, are ready to receive them. Every one of these porters has a cupboard in the hut for the separate use of himself. The plaintiff, who was one of these porters, put goods into the hut, which he laid in such a manner that the defendant, who was another of them, could not well come to his cupboard without removing them. The defendant, in order to come to his cupboard, removed the goods about a yard nearer to the door of the hut, and left them there. The goods being afterwards lost, the question was, Whether this removal of them amounted to a conversion ? It was ruled that it did

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not. And by Pratt, C. J.—The plaintiff, by laying his goods in such manner as to prevent the defendant from coming to his cupboard, was a wrongdoer; and, consequently, it was lawful for the defendant to remove them. If an action upon the case had been brought, it would even then have been doubtful whether the defendant was bound to return the goods to the place from whence he had removed them: but it is quite clear, that he is not guilty of a conversion; because the injury, if any, arose from a non-feasance.

Stra. 128, *Bushel v. Miller*.

It is laid down in divers books, that if J S, who came to the possession of the goods of J N by the delivery of J N, refuse to deliver them to J N, this is only evidence of a conversion, and not an actual conversion.

1 *Roll. Abr.* 5, *Isaac v. Clark*; *Hob.* 187; 2 *Show.* 179. ¶This is settled law.} *Addis.* 153, *Horsefield v. Cost.*}

It is in other books laid down, that a refusal to deliver goods to the person in whom the general property is, is an actual conversion, although the person who refuses came to the possession of the goods by the delivery of the person in whom the general property is.

Moor, 460; *Cro. Car.* 262; 6 *Mod.* 112.

The question, whether there has been a conversion, is so entirely for the consideration of the jury, that the court cannot supply by intendment the want of its being expressly found by the verdict; for the court can never intend a person to have been a wrongdoer.

2 *Mod.* 244, 245, *Mires v. Solebay*; 10 *Rep.* 57.

¶And therefore the finding a demand and refusal in a special verdict is not sufficient.

And a demand and refusal is no evidence of a conversion, where it is apparent that the defendant has made no conversion; as where the defendant cut down trees, and left them lying on the place where they were felled.

2 *Mod.* 244; *Bull. N. P.* 44. β When an actual conversion is proved, no demand and refusal are requisite. *Earle v. Vanburen*, 2 *Halst.* 344.g

So a demand and refusal is no evidence of a conversion in case of a carrier or wharfinger, where the goods are proved to have been lost through negligence, or stolen; and therefore trover does not lie; but the owner may have an action on the case.

1 *Ventr.* 223; 2 *Salk.* 655; 5 *Burr.* 2825; *Peake's Ca.* 68; *Devereux v. Barclay*, 2 *Barn. & A.* 702.

But trover will lie against a carrier who delivers goods to a wrong person, though by mistake or negligence; or against a warehouseman under similar circumstances.

Stephenson v. Hart, 4 *Bingh.* 476. β Trover lies against a common carrier, who puts goods on a wharf, for such part of them as are lost, or not actually delivered to the consignee. *Ostrander v. Brown*, 15 *Johns.* 39.g

β Trover will not lie against a common carrier for not delivering goods intrusted to him for transportation, if the goods are not in his possession at the time of the demand, and have been either lost or stolen; the proper remedy is case.

Packard v. Getman, 4 *Wend.* 613.g

So also, where the carrier delivers them under a forged order.

Lubbock v. Inglis, 1 *Stark.* 104.

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But for a bare non-delivery it will not lie, unless the goods be in possession of the defendant, and he refuse to deliver them on demand.

Dewell v. Moxon, 1 Taunt. 391.

β A common carrier is liable in trover for losing goods.

Greenfield Bank v. Leavitt, 17 Pick. 1. See 1 Pick. 50. But see *contra*, *Simmons v. Sikes*, 2 Iredell, 98.

An unjustifiable refusal by the master of a vessel to proceed on the voyage or deliver the cargo, is a conversion.

Portland Bank v. Stubbs, 6 Mass. 422. *g*

A carrier's assertion, that he has delivered goods to the consignee, though false, is no evidence of a conversion.

Attersoll v. Briant, 1 Camp. 409.

It is no conversion if a carrier or wharfinger refuse to deliver goods because the plaintiff refuse to pay for the carriage or wharfage of them, nor if he refuse to deliver them till the claimant have proved his right.

2 Lord Raym. 752; 3 Camp. 215; 1 Espin. Ca. 83; *sed vide* *Thompson v. Trail*, 6 Barn. & C. 36.

But if the carrier or wharfinger break open a box containing goods, or sell them, or have them in his custody at the time of the refusal, a demand and refusal are evidence of a conversion.

2 Salk. 655.

Where a party at the time of the refusal has it not in his power to deliver up the goods, the refusal is no evidence of a conversion; as where he had deposited a lease with his attorney, who, he said, had a lien upon it.

Smith v. Young, 1 Camp. 439.

But if the goods are in his control, the refusing to give an order for delivery of them seems to have the same effect as a refusal to deliver goods in the party's possession. Therefore, where the defendant took an assignment of a quantity of tobacco lying in the king's warehouse, by way of pledge from a broker who had purchased it in his own name for his principal, and refused to deliver it to the principal after notice and demand by him, (none other than the defendant to whose name it was transferred, being able to take it out of the warehouse,) this was held a conversion by the defendant.

M'Combie v. Davies, 6 East, 338.

The refusal must be positive and absolute, and not merely evasive, in order to amount to a conversion.

4 Espin. N. P. C. 157.

Where a servant of a company refused to deliver the plaintiff's goods, which were in one of their warehouses, of which he kept a key, without an order from the company; this refusal was held not sufficiently absolute to constitute a conversion.

Alexander v. Southey, 5 Barn. & A. 247; *Ibid.* 847; and see 2 Saund. 47 e, f, g, (5th ed.)

Where a trader on the eve of bankruptcy makes a collusive sale of goods to defraud his creditors, the assignees cannot maintain trover against the vendee without a demand and refusal; for there was no unlawful taking, and the parties at the time were competent to contract.

Nixon v. Jenkins, 2 H. Black. 135; and see 3 Bro. & B. 2.

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So where bills of exchange were delivered by a trader to one of his creditors in contemplation of bankruptcy, and as a fraudulent preference, and the creditor received the money due on the bills after the bankruptcy, it was held that such receipt of the money was not a conversion, and that, in order to maintain trover, the assignees must show a demand and refusal of the bills before they became due.

Jones v. Fort, 9 Barn. & C. 764.

The plaintiff sold goods to Thwaites, who paid for them, and was to take them away; and the defendant coming into possession of them, a demand was made on him for delivery of them by the plaintiff's attorney and Thwaites, and notice was given to defendant of the sale, and the defendant refused to deliver the goods *to any person whatsoever*; upon which the plaintiff repaid the price to Thwaites, and brought trover for the goods; it was held that this demand and refusal were sufficient evidence of conversion, and that no fresh demand by the plaintiff after repayment of the money was necessary.

Pattison v. Robinson, 5 Maul. & S. 105; *sed vide Benjamin v. Bank of England*, 3 Camp. 417.

Where a party, against whom a commission of bankruptcy had been wrongfully issued, gave up his books to the assignees on being required to do so, it was held, he might sue the assignees in trover for them without a demand and refusal.

Summersett v. Jarvis, 3 Brod. & B. 2; 6 Moo. 56.

The conversion may or may not be contemporaneous with the demand and refusal. For, where an attorney had been possessed of certain deeds of the plaintiff for a considerable time prior to Michaelmas term, and a demand and refusal on the 29th November was proved, the court held this evidence of a conversion prior to Michaelmas term.

Wilton v. Girdlestone, 5 Barn. & A. 847; 1 Dow. & Ry. 488, S. C.¶

β Trover lies against a fraudulent purchaser or his vendee with notice, without a previous demand, and, where a note had been given in payment, without a return or tender of the note before the time of trial.

Thurston v. Blanchard, 22 Pick. 18; *Stevens v. Austin*, 1 Metc. 557.

When there is a tortious taking, or an actual conversion by the defendant, no demand is required.

22 Pick. 18; *Pierce v. Benjamin*, 14 Pick. 356; *Bates v. Conkling*, 10 Wend. 589; *Tomkins v. Haille*, 3 Wend. 406; *Farrington v. Payne*, 15 Johns. 431.

A wrongful refusal to deliver up, on reasonable demand, is a sufficient conversion.

Chamberlin v. Shaw, 18 Pick. 278; *Kinder v. Shaw*, 2 Mass. 398.

In an action of trover, where the defendant admits that the property claimed had come to his possession, that he had sold it and received the money for it, no demand is requisite, this is sufficient evidence of a conversion.

Everett v. Coffin, 6 Wend. 603.

It is a conversion when a factor pledges the principal goods for his own debt.

Kennedy v. Strong, 14 Johns. 128; *Van Amringe v. Peabody*, 1 Mason, C. C. 440.

It is not requisite to show a manual taking of the thing in question, nor that the defendant applied it to his own use, to constitute a conversion;

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the assumption of a right to dispose of it, or the exercise of dominion over it, to the exclusion or in defiance of the plaintiff's right, is a conversion.

Judah v. Kemp, 2 Johns. Cas. 411; *Reynolds v. Shuler*, 5 Cowen, 323.

Possession, accompanied with a claim of title, is a conversion.

Dowd v. Wadsworth, 2 Dev. 130.

If the plaintiff purchase a quantity of light wood, set as a tar kiln, on defendant's land, but not banked nor turfed, and he makes a demand of it from the defendant, who threatens that, if he comes on the land for the purpose of carting it away, he will sue him, this is evidence of a conversion.

Nichols v. Newsom, 1 Car. Law Repos. 227. See *Hare v. Pearson*, 4 Iredell, 76.

An act of ownership over personal property, inconsistent with the rights of the owner, is a conversion.

Carraway v. Burbank, 1 Dev. 306.

A demand of payment or satisfaction for the goods, generally, is a sufficient demand.

La Place v. Aupoix, 1 Johns. Cas. 406.

Conversion is in its nature a tort, and infancy can afford no protection.

Vasse v. Smith, 6 Cranch, 226.

On being requested, the possessor of goods refused to send them to a particular place; but said he would not deliver them until a debt due to him was guaranteed. Held, that though he was not bound to send the goods, yet this was evidence of conversion.

Sharp v. Pratt, 3 C. & P. 34.

If one buy goods of a bankrupt under such circumstances to entitle the assignees to maintain trover for them, such buying is, in itself, a conversion, and the assignees are not required to prove a demand and refusal.

Yates v. Carnsew, 3 Car. & P. 99.

Every wrongful act which will support trespass, will not be sufficient to maintain trover; in the latter case such act must amount to an assertion of right, inconsistent with the plaintiff's general right of dominion over the property, or by destruction, depriving him of it altogether; where, therefore, the defendant, in order to get rid of the plaintiff as a passenger on board his ship, sent his horses, which had been received on board, ashore; held, that the jury were improperly directed that the simple act of removal amounted to a conversion, and a new trial was granted.

Foulds v. Willoughby, 1 Dowl. N. S. 86; 8 Mees. & W. 540.

The real owner made a demand for his goods, the defendant refused to deliver them, stating as the reason for his refusal, that they had been attached in his hands by a foreign attachment in a suit against a third party, from whom he had received them as his own, which was the fact. Held, that there was no evidence of a conversion.

Verall v. Robinson, 2 C. M. & R. 495; 4 Dowl. P. C. 242; 1 Gale, 244.

The demand and refusal necessary to afford evidence of a conversion, in trover, must be absolute and unqualified.

Philpot v. Kelly, 4 Nev. & M. 611.

A demand was made of a servant, who refused to deliver, because he had no authority, and his conduct was afterwards approved of for that reason; held, that the approval did not render the master chargeable with a conversion.

Mount v. Derick, 5 Hill, 455.

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[In order to maintain an action of trover, the plaintiff must prove that the goods in question were his property, and that *while they were so*, they came into the defendant's possession, who converted them to his own use. He must also show that he had at the time the actual possession, or at least a virtual possession of them; for if he had a right to the possession, it is implied by law.

2 Term R. 756; Term R. 12; {1 Cain. 14, Heyl v. Burling; Taylor, 152, Hostler's Adm'rs v. Skull.}

Hence trover will not lie at the suit of the owner of stolen goods, which are *bond fide* sold in market overt before the conviction of the felon; for the property is thereby changed; and though conviction revests the original ownership, ||by virtue of the statute 21 Hen. 8, c. 11,|| yet cannot the owner even then maintain this action against one who was not in possession of them at the time of the conviction, notwithstanding he parted with the possession after notice from the owner of the felony.

Horwood v. Smith, 2 Term R. 750. β Trover lies for stolen goods after the conviction of the felon. Foster v. Tucker, 3 Greenl. 458; Boody v. Keating, 4 Greenl. 164. § Stat. 21 H. 8, c. 11. This statute is confined to cases of felony; and therefore if goods are obtained on false pretences, and pawned for a valuable consideration, the original owner is not entitled to them on conviction of the offender. Parker v. Patrick, 5 Term R. 175. The property in the goods in this case appears to have vested in the party who got them on false pretences, notwithstanding the fraud. See per Gibbs, C. J., 6 Taunt. 13; 1 Marsh. R. 415; and see 2 Marsh. R. 366. But as long as the property remains in the original owner, he is entitled to have them, notwithstanding any tortious and unauthorized pledge of them by another. See Hooper v. Ramsbottom, 6 Taunt. 12; 1 Marsh. 415; 4 Camp. 121; Hartop v. Hoare, 3 Atk. 44; Hoare v. Parker, 2 Term R. 376; Packer v. Gillies, 2 Camp. 336, n.; Barton v. Williams, 5 Barn. & A. 395; and see 1 Jac. 1, c. 21, § 5, or any unauthorized sale of them by another, not being in market overt. Wilkinson v. King, 2 Camp. 335. As to pledges by factors, see tit. *Merchant and Merchandise, Principal and Factor, ante*, Vol. vi. ||

β Trover may be maintained against a stranger upon a mere prior possession obtained by a purchaser of chattels under a void execution.

Duncan v. Spear, 11 Wend. 54.

The finder of a chattel has a general property in it, and may maintain trover against any one except the rightful owner.

M'Laughlin v. Waite, 9 Cowen, 670.

Trover will lie to recover property obtained by fraud under a pretended contract.

Waters v. Van Winkle, 2 Penning. 567; Woodworth v. Kissam, 15 Johns. 186. §

Hence also this action will not lie for a horse which has been given in exchange for one that has turned out unsound.

Power v. Wells, Cowp. 118.] β In case of a fraudulent exchange, trover will not lie without returning all the property received by the plaintiff. Kimball v. Cunningham, 4 Mass. 502. §

||Nor will it lie for bills of exchange discounted, and for which another bill has been given in exchange, which is dishonoured when due. For the property in the bills is altered by the exchange.

Hornblower v. Proud, 2 Barn. & A. 327; and see Bishop v. Shillito, Ibid. 329, and 3 Camp. 299. || β See Besherer v. Swisher, 2 Penning. 748. §

[From the want of the right of possession it was holden, that where goods leased as furniture with a house had been wrongfully taken in execution by the sheriff, this action could not be maintained by the landlord against the sheriff, pending the lease.

Gordon v. Harper, 7 Term R. 9;] {2 Esp. Rep. 465.} ||Vide 15 East, 607; 3 Camp. 187; Ry. & Moo. Ca. 99; 5 Bingham. 305. ||

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||But if trees, or other things annexed to the freehold and demised therewith, be severed during the term, they immediately become vested in the owner of the inheritance, and he may maintain trover for them.

Farrant v. Thompson, 5 Barn. & A. 326.||

On the above principle, that the right of possession as well as the right of property, is necessary to enable a party to maintain trover, it has been decided that the vendee of goods cannot maintain trover for them against the vendor until he have paid or tendered the price; for by the contract of sale he only acquires the right of property, but does not acquire the right of possession till the price be paid or tendered.

Bloxam v. Saunders, 4 Barn. & C. 941; 7 Dow. & Ry. 896.||

[Neither will it lie for goods sold without any earnest, delivery, or agreement in writing; the statute of frauds in such case preventing the property from vesting.

Alexander v. Comber, 1 H. Black. 20.]

{A having agreed to purchase of B the remainder of a term, the latter delivered to him the lease in order that he might get an assignment made out. A then obtained an enlargement of the term from the original landlord, and refused to accept an assignment, or pay the full price agreed on, because B's under-tenant had removed some fixtures, and also refused to return the lease. The court was of opinion that although A, on payment of the purchase-money and taking an assignment, would be entitled to retain possession of the indenture of lease, yet that B had a right to insist upon an assignment being made out with covenants to protect himself, and that therefore, as A had refused to accept an assignment or return the lease, an action of trover for it was maintainable.

2 Bos. & Pul. 451, *Parry v. Frame*.}

The person in whom the general property in a personal chattel is, may maintain an action of trover for the conversion thereof, although he have never been in the actual possession thereof; because a general property in the case of a personal chattel draws to it a possession in law, and such possession is, by reason of the transitory nature of a personal chattel, sufficient to found this action upon.

Bro. Tresp. pl. 303; *Latch.* 214; 2 Bulstr. 268.

If the person, in whom the general property in goods which lie at York is, give them to J S, who is at London at the time of the gift, and before J S obtain the actual possession of the goods a stranger convert them, an action of trover lies; because J S acquired a general property in the goods by the gift.

Bro. Tresp. pl. 303; *Latch.* 214.

||But unless the gift be by deed or instrument in writing, (*qu.* whether necessarily under seal,) the property in the goods does not pass to the donee without a delivery, at least he has not such a property as to enable him to maintain trover against the donor, and it seems very difficult to suppose that he has even a special property sufficient to maintain trover against a stranger: for a special property seems to be always according to the intention of the general owner; but the donor by his gift intended to pass the absolute property, and if that does not pass, how can it be held that any thing passes at all?

Irons v. Smallpiece, 2 Barn. & A. 550; and see 7 Taunt. 226; 2 Marsh. 532; 2 Saund. 47 a, (5th edit.)||

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But if the giver of the goods had been an infant, J S could not have maintained this action for the conversion thereof: because no person acquires a general property in goods by the gift of an infant.

Bro. *Tresp.* pl. 150.

If the bailee of goods give them to J S, but do not deliver them, and a stranger convert the goods, an action of trover does not lie; because, as the goods were not delivered, J S did not acquire a general property in them by the gift of the bailee, who had only a special property therein.

Bro. *Tresp.* pl. 216.

If goods, which were the property of a testator, are converted by a stranger before the testator's will is proved, and the person appointed executor afterwards prove the will, he may maintain action of trover; for, although an executor have no property in the goods of his testator until he has proved his will, as soon as this is done, he acquires by relation a general property therein from the time of his testator's death.

2 Bulst. 263, *Fisher v. Young*. ¶ An administrator may maintain trover for a conversion of title-deeds in the lifetime of the deceased. *Towle v. Lovett*, 6 Mass. 394.

¶ If goods under an attachment be wrongfully taken from an officer, and he die, his administrator may maintain trover for the goods for the benefit of the attaching creditor.

Hall v. Walbridge, 2 Aik. 215.

Plaintiff's intestate bought a coach from the defendant and took possession of it; he gave him bills for the price, and agreed that defendant "do have and hold a claim upon the coach until the debt was fully paid." One of the bills being dishonoured and the intestate being dead, the defendant obtained possession of the coach by a trick. In an action of trover brought by the administrator, held, that the agreement was only a personal license between defendant and intestate, for the defendant to take the coach if the bills were not paid, and would have been a good defence to an action of trover brought by the intestate, but was not available after the property was transferred to the administrator.

Howes v. Bull, 7 B. & C. 481.

If a testator have bequeathed specific goods, the legatee may maintain an action of trover for the conversion thereof by a stranger, although they have not been delivered to him by the executor; because a general property in the goods was vested in him immediately upon the death of the testator. (a)

Bro. *Tresp.* pl. 25. ¶ (a) But not unless the executor have assented to the bequest. See 9 Barn. & C. 156.

But if a testator have bequeathed a third part of his goods to J S, and before any of the testator's goods are delivered by his executor to J S, all the goods are converted by a stranger, J S cannot maintain this action; because, until his part thereof is ascertained by delivery of the executor, he has not a general property in any of the testator's goods.

Bro. *Tresp.* pl. 25.

If wrecked goods are converted by a stranger, before they are seized by J S, in whom the right of wreck is, J S may maintain an action of trover; a general property in the goods being vested in him.

Fitz. N. B. 91; 6 Mod. 8, 149.

It is in the general true, that if two persons are owners of a personal

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chattel, one of them cannot maintain an action of trover for the conversion thereof by a stranger.

3 Leon. 113, *Nelthorpe v. Farrington*. || *May v. Harvey*, 13 East, 197, *acc.*; but the objection can only be taken by plea in abatement of the nonjoinder. 1 Will. Saund. 291 k; 4 East, 122. || § But when one joint owner is entitled to the exclusive possession he may sue alone. *Thompson v. Cook*, 2 South. 580. §

But in order to encourage the building of ships, it has been holden, that the owner of an eighth, or any other part of a ship, may maintain this action for the conversion of such part by a stranger.

Skin. 640, *Dockwray v. Dickenson*. || See *Watson v. King*, 4 Camp. 272; 1 Stark. Ca. 121. || § But a part-owner cannot maintain trover against another part-owner. *Lowthrop v. Smith*, 1 Hayw. 255. §

And it is said, that if a man bring this action against a stranger for the conversion of a whole ship, and it come out in evidence that only the sixteenth part thereof is his property, he may recover damages to the value of this part.

Skin. 640, *Dockwray v. Dickenson*.

|| One joint-tenant, tenant in common, or parcener, cannot maintain trover against his companion for a chattel still in his possession; because the possession of one is the possession of both, and the defendant may take advantage of this defence on the general issue.

Co. Lit. 200 a; 1 Salk. 290; 1 Term R. 658. § But it is otherwise if one destroys the property, or does acts inconsistent with the nature of the partnership, and which in the common course of things would either destroy the other's interest in the property, or the property itself. *Cowan v. Buyers, Cooke*, 53. §

But if one joint-tenant, tenant in common, or parcener, destroy the thing in common, the other may bring trover.

§ If one joint-owner of a cargo sell a part of it with the consent of the other joint-owners, it is a severance of the tenancy, and, on their engagement to deliver the property purchased, it is a severance of the property, and the purchaser may bring trover against the other joint-owners.

Seldon v. Hickock, 2 Caines, Cas. in Err. 166. §

And where one tenant in common of a ship forcibly took it away and sent it to the West Indies where it was lost in a storm, it was held by King, C. J., of the C. B., to be evidence of a destruction, and the jury under his directions found it to be so.

Bull. N. P. 34, *Barnardiston v. Chapman*, cited 4 East, 121.

However, it would appear, that the *mere* sale of a ship by one tenant in common is not equivalent to a destruction, since such sale only passes the interest of the seller. But the sale of ordinary goods in market overt by one tenant in common of them would appear to be a conversion, so as to subject him to an action of trover by his co-tenant for his undivided part. Where one tenant in common of a whale refused to deliver a moiety of it to the other, and cut it up and expressed the oil, this was decided to be no destruction, so as to subject him to an action of trover; since this was, in fact, applying it to the only purpose which could make it profitable to the owners.

Heath v. Hubbard, 4 East, 110; and see 5 East, 407; *Barton v. Williams*, 5 Barn. & A. 395; *Fenning v. Lord Grenville*, 1 Taunt. 241; and see 2 Saund. 47 (h), (5th ed.) ||

A, seised in fee of land, sold twenty trees thereon growing to B and his assigns, which were to be set out by A and felled by B. After B had as-

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signed his interest therein to C, A set out the twenty trees, and C felled them. The trees being afterwards taken away by D, C brought an action of trover. The action was holden to be maintainable; for that the interest of B, which was said to be more than either a chose in action or a possible interest, was assignable.

5 R. 24, *Palmer's Case*; [Cro. Eliz. 819, S. C.; 3 Wils. 336, 337, 338, S. C. cited and approved.]

A was tenant for life of land without impeachment of waste, except the waste were voluntary, with reversion to B. After B had sold some trees growing upon the land to C, A cut down the trees and sold them to D, who took them away. An action of trover being hereupon brought by C, it was holden that the action did not lie; for that B had not a power to fell trees growing upon the land during the life of A.

Cro. Car. 279, *Waller v. Sands*.

[Trover is not maintainable by a tenant in tail, expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon and had been severed from the estate; for the tenant for life without impeachment of waste has a right to the trees the moment they are cut down.

Pyne v. Dor, 1 Term R. 55.]

|| But where lands and woods were conveyed to trustees who took only an estate *pur autre vie*, it was held that they could not maintain trover against a stranger who cut down trees by order of the *cestui que vie*; for the trees when cut belonged to the owner of the inheritance, and the trustees had no property in them.

Blaker v. Anscomb, 1 New R. 25; and see *Blackett v. Lowes*, 2 Maul. & S. 494; *Cotterill v. Hobby*, 4 Barn. & C. 465; *Channon v. Patch*, 5 Barn. & C. 897.]

If goods be delivered by A to B, in order that B may deliver them to C, and B instead of delivering the goods convert them, C may maintain an action of trover.

2 Bulstr. 68, *Flewelling v. Rave*; *Ld. Raym.* 276. || See *Dutton v. Solomons*, 3 Bos. & Pul. 512; *Dawes v. Peck*, 8 Term R. 350; *King v. Meredith*, 2 Camp. 640; *Groving v. Mondham*, 5 Maul. & S. 189.]

If two persons each stake a sum of money in the hands of a third person by way of wager, he who wins the wager may, in case the stakeholder refuse to deliver it, maintain an action of trover for the whole money.

Cro. Eliz. 870, *Ledesham v. Lubram*.

A granted a lease of the coal-mines already opened, or which should thereafter be opened upon his manor of B, to C for the term of ninety-nine years. During the term, D the son of A opened a mine in a copyhold estate belonging to E, which was parcel of the manor, and dug and carried away coals. An action of trover being brought by C for the conversion of the coals carried away, it was holden that the action was maintainable.

1 Johns. 243, *Player v. Roberts*.

|| Where in trover for copper ore it was proved that plaintiff was in possession of land in which he sunk a shaft and raised the ore in question, and the same witness on cross-examination proved that the same ore was taken away by a person who had a shaft in an adjoining close, and who was getting the same lode of copper ore under the plaintiff's land when he sunk his shaft: held that this was *prima facie* evidence of the plaintiff's title to the ore, which must be left to the jury.

Rowe v. Brenton, 8 Barn. & C. 737.

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The person in whom the general property in goods is may in some cases maintain an action of trover for the conversion thereof by a stranger, although another person had at the time of the conversion a special property in the goods.

2 Roll. Abr. 569, (P), pl. 5 ; 1 Sid. 443.

If goods which were bailed by J S to J N be lost by J N, and be afterwards converted by a stranger, J S may by reason of his general property in the goods maintain an action of trover.

2 Roll. Abr. 569, (P), pl. 5.

But if the bailee of goods give them to a stranger, and deliver them, the bailor cannot maintain this action ; for by the gift and delivery of a person who has a special property in and a possession in fact of the goods, the general property of the bailor is divested.

Bro. *Tresp.* pl. 216, pl. 295. β See *Leonard v. Tidd*, 3 Metc. 6.γ

|| But in two recent cases it has been held, that if a bailee of goods for a particular purpose transfer them to another in contravention of that purpose, the owner may maintain trover against such transferee, even although he be a *bonâ fide* vendee, unless the sale be in market overt.

Wilkinson v. King, 2 Camp. 335 ; *Loeschman v. Machin*, 2 Stark. N. P. C. 311.||

If a servant, who had a general authority to receive and pay money for his master, give the money which he received of J N, for the use of his master, to J S, and deliver it to him, the master may maintain an action of trover ; because, as the servant had only an authority to receive the money, it must be intended that his possession was the possession of his master, and, consequently, he had not such a special property in the money as enabled him to transfer the general property by a gift, notwithstanding there was a delivery.

Salk. 289, Anon. ; Cro. Eliz. 638.

It is in the general true, that wherever one person is answerable to another, in whom the general property is, for goods of which he had once a possession in fact, he has such a special property in the goods as enables him to maintain an action of trover for the conversion of them by a stranger.

Fitz. N. B. 89, 92 ; 1 Inst. 89 ; Bro. *Tresp.* pl. 83 ; 4 Rep. 84 ; 2 Roll. Abr. 569, pl. 5, pl. 7 ; 1 Sid. 438 ; 2 Saund. 47.

β Where an agent, upon a settlement with the debtor of his principal, takes, in full discharge of the claim, a promissory note specially endorsed to him by the debtor, the principal cannot maintain trover against the agent for this note.

Floyd v. Day, 3 Mass. 403.γ

If J S have bailed a beast to J N for ploughing his land, and the beast be converted by a stranger, J N may maintain an action of trover ; because, as the beast was delivered to J N for a purpose beneficial to himself, he is answerable for it to the bailor.

Bro. *Tresp.* pl. 92 ; Ld. Raym. 913, 915.

If the goods taken by a sheriff in execution are converted by a stranger, the sheriff may maintain action of trover ; because he is answerable to the person for whom the goods were taken.

1 Sid. 438, *Wilbraham v. Snow* ; 1 Mod. 31. || But the sheriff must continue in possession in order to maintain such action. *Blades v. Arundale*, 1 Maul. & S. 711 ; and the action cannot be maintained by a landlord against a stranger for converting

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goods distrained; for the landlord has no property in the goods, but has them only as a pledge, with a power of sale by statute. *Selw. N. P.* 1303; 2 *Saund.* 47 (a), (5th edit.)

§ A constable has not such a possession of the goods of the defendant, by the mere receipt of an execution, as will enable him to maintain trover for them. He acquires a sufficient possession to maintain this action by making a levy or an inventory of them.

Wintermute v. Hankinson, 1 *Halst.* 140; *Cliver v. Applegate*, 2 *South.* 479; *Brink v. Decker*, 2 *Penning.* 903. See *Dennie v. Harris*, 5 *Pick.* 120; *S. C.* 9 *Pick.* 364.

An officer who has levied upon personal property is not deprived of his special interest therein by taking the bond or receipt of a third person, stipulating for its production on the day of sale; the officer may maintain trover for them as his special property, if possession of them be taken by a wrongdoer.

Hankins v. Kingsland, 2 *Hall*, 425.

The sheriff has a sufficient property in goods levied upon by him, to maintain trover for taking them away and converting them.

Lockwood v. Bull, 1 *Cowen*, 322; *Baker v. Miller*, 6 *Johns.* 195; *Blackley v. Sheldon*, 7 *Johns.* 32.

A, having an execution against B, levies on his goods, and, at the sale of them, becomes the purchaser; though it may be questionable whether he could become the purchaser, yet, by virtue of the levy and possession, he may maintain trover, on such special property.

Schermerhorn v. Van Volkenburgh, 11 *Johns.* 529.

Where property has been levied upon by virtue of an attachment, and afterwards a second levy is made upon the same property, under another attachment, the officer making the second levy is not entitled to an action of trover against a sheriff who illegally takes and sells the property.

Dubois v. Harcourt, 20 *Wend.* 41.

A sheriff to whom an execution is delivered, before an actual levy, has not such property in the goods of the defendant in the execution as will enable him to maintain trover against a person who has tortiously taken them away, and converted them to his own use.

Hotchkiss v. M'Vickar, 12 *Johns.* 403.

If the goods of J S, which were delivered to J N to be carried for hire, are converted by a stranger, J N may maintain an action of trover; because he is answerable to J S.

2 *Rep.* 84; *Salk.* 26, 145; 1 *Mod.* 31.

The agistor of a beast may maintain an action of trover for the conversion thereof by a stranger, because he is answerable to the owner of the beast.

Bro. Tresp. pl. 67; *Moor*, 543. [See *Rooth v. Wilson*, 1 *Barn. & A.* 59.] § *Nicholls v. Bastard*, 1 *Tyr. & G.* 156; 2 *C. M. & R.* 659; 1 *Gall.* 295.

|| A person who has a temporary property in goods, and who delivers them to the general owner for a special purpose only, may, after that purpose is answered, upon a demand and refusal, maintain trover for them. Thus the vendee of an estate, to whom an abstract of the vendor's title is delivered for the purpose of investigation, and who has laid it before counsel with a fee, and obtained counsel's opinion and remarks on it, has a special property in it against all the world; and if on delivery to the vendor

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for the purpose of having the counsel's queries satisfied, the vendor refuses to re-deliver it, the vendee may maintain trover against him for it.

Roberts v. Wyatt, 2 Taunt. 268; and see 6 Taunt. 12.||

Churchwardens may maintain an action of trover for the conversion of goods belonging to their church by a stranger during their churchwardenship, because they are answerable to their successors.

Fitz. N. B. 92; 1 Ventr. 89; 1 Mod. 65.

And it is said, that churchwardens may maintain this action for the conversion of goods belonging to their church by a stranger, during the churchwardenship of their predecessors.

Fitz. N. B. 89, 92.

But it may be inferred from what is said in another book, that churchwardens cannot maintain this action for the conversion of goods belonging to their church by a stranger, during the churchwardenship of their predecessors.

Dyer, 43; ||*sed vide cont.* 2 Saund. 47 c, and cases there cited.||

||An uncertificated bankrupt may maintain trover for goods acquired since his bankruptcy against all the world, except his assignees; he having a special property in them.

Webb v. Fox, 7 Term R. 391.||

The finder of a jewel, although he do not acquire by the finding a general property therein, may maintain an action of trover against a stranger who converts it; because, as the finder is answerable for the jewel to the person in whom the general property is, he has a special property therein.(a) He has moreover a right to the jewel as against every person, except the person who lost it.

Stra. 505, Armory v. Delamire. ||(a) Nothing is said in the report in Strange of the finder being answerable to the person in whom the general property is; and it is conceived the finder would not be answerable to the general owner for a conversion of the jewel by a stranger while in the finder's keeping, even although the finder were negligent of it; the sound reason for the decision seems to be that the finder has a special property arising simply from *lawful possession*, and that this entitles him to maintain trover against a wrongdoer. See 2 Saund. 47 d.||

||So where a cottager and inhabitant, claiming a right to cut rushes on a common, had cut down several load, which the defendant carried away, it was held that the cottager had such a possession of the rushes as enabled him to maintain trover, and to throw it upon the defendant to show a property in them.

Rackham v. Jesup, 3 Wils. 332; and see 2 Stra. 777.

So where the plaintiff bought a vessel which was stranded, and which was not conveyed to him according to the provisions of the register acts, and the plaintiff took possession of her, and for some days endeavoured to save her, and the wreck drifted on defendant's premises, who cut it up and carted it away, it was held that the plaintiff had sufficient property to maintain trover against a wrongdoer.

Sutton v. Buck, 2 Taunt. 302; and see Burton v. Hughes, 2 Bing. 173.||

It was formerly holden, that if goods, which have been delivered generally to be kept, are converted by a stranger, the bailee may maintain an action of trover, because he is answerable for the goods to the person in whom the general property is; but that if goods, which have been delivered to be kept as the bailee keeps his own goods, are converted by a

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stranger, the bailee cannot maintain this action, because he is not answerable for the goods to the person in whom the general property is.

4 Rep. 84, Southcote's case; 1 Inst. 89. β A shipowner has a sufficient property in the goods shipped, to maintain trover for an attachment without payment or tender of the freight. *De Wolf v. Dearborn*, 4 Pick. 466.γ

But in a modern case, in which Southcote's and all the old cases seem to have been well considered, this distinction is exploded; it being therein laid down, that the bailee of goods, which have been delivered generally to be kept, is not answerable to the person in whom the general property is, for the conversion thereof by a stranger, unless the conversion be owing to some gross neglect of his; for that it would be very unreasonable that a person, who receives no advantage from keeping the goods of another, should at all events be answerable for the conversion thereof.

Ld. Raym. 913, 914, 915, *Coggs v. Barnard*.

It is upon the whole clear, that both the person in whom the general property in goods is, and the person in whom the special property therein is, may maintain an action of trover for the conversion thereof by a stranger.

But if either of these has recovered damages for the conversion of the goods, this ousts the other of his right of action; for it would be very unreasonable that a double satisfaction should be made for the conversion of the goods.

2 Roll. Abr. 569, (P), pl. 5; {Taylor, 153.}

{An American vessel was captured by a French privateer, and carried into Porto Rico, a Spanish port, and from thence to Samana, where she was put in requisition by the French government and sent to Barracoa, where she was dismantled and abandoned. The vessel, having stranded on the beach, was, some months after, sold at auction by the commanding officer of the port, and purchased by an American, who afterwards repaired her at a great expense, and brought her to New York, where she was demanded by the original owner, who brought an action of trover for her. And the court held that he could not recover; for the vessel being abandoned and a wreck, and having been sold by the government at Barracoa according to the laws of Spain in cases of wreck or derelict, the property was transferred by the sale to the purchaser, who thereby acquired a valid title, which would be everywhere respected.

4 Johns. Rep. 34, *Grant v. M'Lachlin*.

When an agent compromises a demand of his principal, by receiving from the debtor a negotiable note for a greater amount endorsed specially to the agent, who pays the difference to the debtor, the principal cannot maintain trover for the note. The property of the note is in the agent; and he is answerable in assumpsit to his principal for the money which he ought to have received from the debtor.

3 Mass. T. Rep. 403, *Floyd v. Day*.}

||The property in an exchequer bill (the blank in which is not filled up) passes, by delivery, like that in bank-notes, and consequently if the owner deposit it for sale with an agent, and the agent pledge it to A B for money advanced to him by A B, the owner cannot maintain trover for the bill against A B; and it is the same as to Prussian bonds, by which the king of Prussia binds himself to every person, for the time being holder of the bonds, for payment of the principal and interest. But if the party taking such instruments in pledge know that the pledger is not the real owner, or

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have reasonable grounds for suspecting so, trover will lie against him by the owner.

Wookey v. Pole, 4 Barn. & A. 1; Gorgier v. Mieville, 3 Barn. & C. 45; and see 13 East, 509, & 51 G. 3, c. 64, as to India Bonds.

And so it is as to bank-notes, bankers' drafts payable to bearer, and bills of exchange endorsed in blank.

Miller v. Race, 1 Burr. 452; Grant v. Vaughan, 3 Burr. 1516; Peacock v. Rhodes, Dougl. 636; Solomons v. Bank of England, 13 East, 135; Gill v. Cubitt, 3 Barn. & C. 466; Down v. Halling, 4 Barn. & C. 330; Snow v. Peacock, 3 Bing. 406; Snow v. Sadler, Ibid. 610.

If the owner of goods, which have been wrongfully converted, do any thing to affirm the acts of the wrongdoer, he cannot afterwards disaffirm them and sue him in trover for the conversion.

Brewer v. Sparrow, 7 Barn. & C. 310.¶

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It has been holden that a person cannot have such property in a negro in England, as will enable him to maintain an action of trover for converting the negro; and that he can only recover, as he may in the case of any other servant, damages for the loss of service.

Ld. Raym. 146, Chamberlain v. Hervey, Hil. 8 W. 3.

It appears, from another report of this case, that one question was, whether the baptism of the negro after the conversion did not amount to an emancipation, and consequently take away the plaintiff's right of action; but the court determined the case upon the general question, without giving an opinion as to this question.

Carth. 397.

In a still later case it was holden, that a man (*a*) cannot have such a property in a negro in England, as will enable him to maintain an action of trover for the conversion of the negro.

Ld. Raym. 1274, Smith v. Gould, Pasch. 5 Ann. ¶(*a*) This must be understood of a British *subject*, who cannot have a property in a negro on which can found a claim in a British court of justice. See Forbes v. Cochrane, 2 Barn. & C. 448. But a foreigner, who is not prohibited by the laws of his own country from trading in slaves, may in the British courts recover the value of slaves seized. Madrazzo v. Willes, 3 Barn. & A. 353.¶

¶An apprentice or servant for a term of years is not property, properly speaking, and therefore not an object of an action of trover.

Stille v. Jenkins, 3 Green, 308.¶

If the sheep of J N are mixed with the sheep of J S, and the latter, in order to separate his sheep from those of J N, chase the sheep of J N to the next place proper for separating them, an action of trover does not lie; because, as the sheep of J S cannot be easily separated from the sheep of J N without such chasing of the sheep of J N, the chasing of them is lawful.

Bro. Tresp. pl. 213.

An action of trover lies for the conversion of a dog; for, a dog being a tame animal, property may as well be in a dog as in any other tame animal.

Fitz. N. B. 86; Bro. Tresp. pl. 407; Hob. 283; Cro. Eliz. 125; Cro. Ja. 463; [2 Bl. R. 1117.]

If J S be chasing the beast of J N with a little dog, in order to chase it

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out of land in his possession, and J N kill the dog, an action of trover lies; because, as J S had an election to chase the beast out of his land, or to distrain it damage-feasant, the chasing with such a dog is lawful.

1 Freem. 347, King v. Rose; 4 Rep. 38; Cro. Car. 254. *β* See Cummings v. Pe-sham, 1 Metc. 555.*g*

But if J S be chasing the beast of J N with a mastiff dog, in order to drive it out of land in his possession, and J N kill the dog, this action does not lie; because the chasing with such a dog is not lawful.

1 Freem. 347, King v. Rose. *β* Trover does not lie for driving a stray into the highway. Stevens v. Curtis, 18 Mass. 227; Nelson v. Merriam, 4 Pick. 249.*g*

If the dog of J N, which is found in the warren of J S, be killed by J S, this action does not lie; the killing of such dog by the owner of the warren being lawful.

Cro. Ja. 45; 1 Sid. 336.

It is in the general true, that an action of trover does not lie for the conversion of a beast or bird *feræ naturæ*; because there is not in the general any property in such beast or bird.

Bro. Detin. pl. 44; Dyer, 306; Cro. Car. 19, 545.

But if a beast or bird *feræ naturæ* have been reclaimed, this action does lie for the conversion thereof; because there is a property in such beast or bird.

Bro. Detin. pl. 44; *¶* Com. Dig. *Action sur Trover*, (C); and see tit. *Trespass*, ante, 474.*¶*

And an action of trover sometimes lies for the conversion of a beast or bird *feræ naturæ*, although the beast or bird have not been reclaimed.

If a hare be killed by J N upon the land of J S, an action of trover lies, although it have not been reclaimed; inasmuch as J S has, by reason of its being upon his land, a local property in the hare.

Fitz. N. B. 87; Godb. 123; Salk. 556; 11 Mod. 75. *β* See Gillet v. Mason, 7 Johns. 16; Wallis v. Mease, 3 Binn. 546; Ferguson v. Miller, 1 Cowen, 243; Idol v. Jones. 2 Dev. 162; Amory v. Flyn, 10 Johns. 102. See title *Game*, (A).*g*

If a hare, which was found upon the land of J S, be driven from thence, and afterwards killed by J N, an action of trover does not in the general lie; for the property of J S, which is only local, may be, and usually is, determined by driving the hare off his land.

5 Rep. 104, Boulton's case; Cro. Car. 554.

But if J S immediately pursue the hare, which has been driven off his land and killed by J N, this action lies; for by the immediate pursuit the local property is continued.

Godb. 123; Salk. 556; 1 Mod. 75.

An action of trover lies for the conversion of a beast or bird, which is valuable on account of its being merchandise, as a monkey or a parrot, although the beast or bird be *feræ naturæ*, and have not been reclaimed.

Cro. Ja. 262, Grimes v. Shack.

β Trover cannot be maintained for taking oysters claimed by the plaintiff, as planted by him in a common navigable stream, in which other oysters were found.

Shepherd v. Leverson, 1 Penning. 391.

Trover can be maintained for geese, now tame, which were once wild.

Amory v. Flyn, 10 Johns. 102.*g*

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||The statute 58 Geo. 3, c. 75, prohibits the buying of pheasants in all cases, and therefore, by a contract for the sale of live pheasants no property passes to the purchaser, and he consequently cannot maintain trover against the seller for not delivering them.

Helps v. Glenister, 8 Barn. & C. 553.||

An action of trover does not lie for the conversion of a record ; because a record is not private property ; but this action lies for the conversion of a copy of a record, the copy of a record being private property.

Hardr. 111, Jones v. Winkworth.

||If a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him, and till then trover cannot be maintained for it by the buyer.

Mucklow v. Mangles, 1 Taunt. 318 ; but see Woods v. Russell, 5 Barn. & A. 942 ; Goode v. Langley, 7 Barn. & C. 27. || See Eaton v. Lynde, 15 Mass. 242. §

§ An agreement, for a valuable consideration, to deliver to the plaintiff the first female colt which a certain mare owned by the defendant might produce, vests a property in the colt when produced, and the plaintiff may maintain trover for such colt.

Fonyille v. Casey, 1 Murph. 389 ; M·Carty v. Blevins, 5 Yerg. 195. §

It is in one case said, that an action of trover does not lie for money, unless it were in a bag at the time of the conversion.

Cro. Eliz. 661, Holiday v. Hicks.

But it is in other cases laid down, that, as the design of this action is not to recover a thing *in specie*, but to recover damages for the conversion thereof, it does lie for money, although it were not in a bag at the time of the conversion.

1 Roll. Abr. 5, (K), pl. 5 ; Cro. Eliz. 841 ; Cro. Car. 89. || See 6 Bing. 404. ||

An action of trover lies for the conversion of money deposited as a wager.

Cro. Eliz. 870, Ledesham v. Lubram.

||A count, stating that the defendant had and received money to the use of the plaintiff to be paid to the plaintiff on request, but that, not regarding his duty, he converted the money to his own use, is bad on demurrer ; as it cannot be considered a count in trover, but is an attempt to convert an action of *assumpsit* into an action of tort.

Orton v. Butler, 5 Barn. & A. 652 ; 1 Dowl. & Ry. 282. ||

If a feme-covert lose the money of her husband at play, an action of trover lies.

1 Sid. 122, Rey v. Stephens.

If goods pledged are not delivered upon payment or tender of the money for which they were pledged, an action of trover lies.

Cro. Ja. 144, Ratcliff v. Davis.

§ Trover cannot be maintained for goods mortgaged to secure a usurious debt, unless the plaintiff has returned or tendered the amount actually loaned.

Lucas v. Latour, 6 Har. & J. 100. §

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¶If goods stolen are pledged with a pawnbroker, an action of trover lies by the owner for the value of them.

Packer v. Gillies, 2 Camp. 336, n.; and see Hoare v. Parker, 2 Term R. 376; and see 1 Jac. 1, c. 21, and *ante* p. 640; and as to the construction of the Pawnbrokers' Act, 39 & 40 G. 3, c. 99, § 17, see Walter v. Smith, 5 Barn. & A. 439; Peet v. Baxter, 1 Stark. 472. As to the remedy of the owner of goods where they are pledged by his factor, see tit. *Merchant*, (B), *Of Principals, Agents, and Factors*, Vol vi.

Where goods were pawned for money advanced at an usurious interest, it was decided that the owner could not maintain trover for them against the pawnee without tendering the principal and legal interest due.

Fitzroy v. Gwillim, 1 Term R. 153; and see 1 Taunt. 413; but see Roberts v. Goff, 4 Barn. & A. 92, *contra*.

Where the plaintiff brought trover against the defendant for detention of papers deposited with defendant in furtherance of a fraudulent purpose, and the jury, to the satisfaction of the judge, found a verdict for defendant, the court refused to grant a new trial.

De Wüts v. Hendricks, 2 Bing. 314.¶

In an action of trover for barley, it appeared that the barley was delivered to the defendant to be made into malt. It was ruled, that the action did not lie, because the barley was delivered to be made into malt; but that, in case there had been a payment or tender of the money due for making the barley into malt, an action of trover would have lain for the malt.

1 Barnard. 431, Adams v. Hutton.

In an action of trover, brought by a widow against the vendee of goods sold by her son, it appeared in evidence, that the plaintiff had sixteen years before let her son into the possession of a farm at that time holden by her, together with the goods in question, which were at that time part of the stock of the farm; and that the son had ever since occupied the farm, and acted as owner of the goods. A verdict being found for the defendant upon this evidence, it was, upon a motion for a new trial, said, that as a transfer of the property in the goods from the mother to the son was not expressly proved, the verdict ought to have been for the plaintiff. A new trial was refused: And by the court—As the son had been so long in the possession of the goods, it ought to be presumed the property was in him. It would moreover be extremely hard, if a purchaser for a valuable consideration should lose his money by the setting up property in the mother, after the property had so long been to all appearance in the son.

MS. Rep. Saunders v. Vincent, East. 31 G. 2, in B. R.

If a sheriff's officer, having a writ of *fieri facias* to take the goods of J N, take the goods of J S, an action of trover lies.

Bro. *Tresp.* pl. 364; 2 Roll. Abr. 352. (O), pl. 3, pl. 9; Carth. 381. ¶See Watson's Office of Sheriff, p. 83, 84; Glasspoole v. Young, 9 Barn. & C. 696, and *post*, p. 658, *acc.*¶

¶Where A agreed with B to make a gig for a given price, and the body and wheels of the gig were selected by B, and A promised to deliver the gig in a few days, and the full price was paid; and before it was finished it was seized under an execution, and was then finished, and by assent of the execution creditor delivered to B, and then the sheriff *retook* it for his poundage, it was held, such retaking was illegal, and B might maintain trover.

Goode v. Langley, 7 Barn. & C. 27.¶

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§ A manufacturer who takes yarn to manufacture into cloth for a commission, may maintain trover for the cloth, although in the possession of a third person, whom he hired to do the work for him.

Eaton v. Lynde, 15 Mass. 242.¶

An action of trover does not lie for taking the goods of J S, which a sheriff's officer has taken under a writ of replevin upon a presumption that they were the goods of J N, because this writ is different from a writ of *feri facias*. By the former, the officer is empowered to take certain goods therein specified; by the latter, he is only empowered to take the goods of a certain person. But if J S claim a property in the goods at the time of taking them, and the officer afterwards carry them away, without having the property determined under a writ *de proprietate probanda*, this action does lie.

Carth. 381, Hallet v. Burt.

§ Trover for 200 sheaves of rye, the defendant in order to justify the taking of the rye, may give in evidence the record of a judgment in ejectment in favour of A B against the plaintiff, and the *habere facias possessionem* by virtue of which A, the plaintiff in the ejectment, was put in possession of the premises on which the rye was cut, and the lease from A, the defendant, the plaintiff in this case, of said premises.

Vandoren v. Bellis, 2 Halst. 137.¶

It was ruled by Holt, C. J., that if a sheriff, who is empowered by an extent to seize the goods of J N, seize the goods of J S, an action of trover does not lie, because by the seizure the property in the goods is vested in the crown.

Ld. Raym. 736, Rex v. Woodward.

If seized goods are condemned by a court having jurisdiction in the matter, an action of trover does not lie; the property in the goods being by the condemnation vested in the crown.

Ld. Raym. 336, Ekins v. Smith; [and see 4 B. Moo. 365.]

It is in one case laid down, that if seized goods are lodged in the custom-house an action of trover does not lie, although there be afterwards a verdict for the claimer of the goods.

Bunb. 67, Etricke's case. [The doctrine which is here delivered in an unqualified manner was merely the opinion of the Lord Chief Baron Bury at *nisi prius*; though it must be acknowledged, that in the discussion of the next case, namely, Israel's case, which seems indeed to be the same with this, the rest of the court concurred in that opinion. However, these cases were both fully considered, and overruled in Tinkler v. Poole, 5 Burr. 2657, where it was holden, that trover would lie against a custom-house officer for seizing goods not liable to seizure. So, recognising this case of Tinkler v. Poole, Lord Kenyon held, where it appeared that a distress for rent made under the assignee of a bankrupt was not legally made, because he was not the legal assignee, the petitioning creditor's debt not having accrued till after the bankruptcy, that trover might be maintained against the person who illegally made the distress. 6 Term R. 298. Such was the judgment of the court, as reported in that case. But there is manifestly a little inaccuracy in the report, as from the state of the case, the assignee himself was the defendant; whereas the noble judge considers the officer who made the distress under the assignee as the defendant; and the point in the case of Tinkler v. Poole, upon which case his lordship relies, was, whether trover was maintainable against the officer.]

But it is laid down in another case, that the owner of the goods may in such case maintain an action of trespass, or an action upon the case.

Bunb. 80, Israel's case.

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. It is laid down, that if J S take goods of J N in order to prevent them from being stolen or damaged, an action of trover lies; because the loss would not, if either of these things had happened, have been irreparable. But if J S take goods of J N which are in danger of being destroyed by fire or otherwise, in order to preserve them, this action does not lie, because the loss would, in such case, have been irreparable.

Bro. *Tresp.* pl. 213.

An action of trover does not lie for the conversion of goods, for which an appeal of robbery has been brought; because a person, who has by bringing the appeal affirmed the taking to have been felonious, shall not afterwards be received to say that it was only a conversion.

1 Jon. 148, 150, Markham v. Cobb; Latch. 144, S. C.

It has been holden in one case, that if J S have been convicted or attainted of taking the goods of J N feloniously, J N cannot, provided he did himself give evidence, or procure any person to give evidence against J S, maintain an action of trover; because he is in neither case entitled, under the 21 H. 8, c. 11, to restitution of the goods.

1 Jones, 147, 150, Markham v. Cobb, Pasch. 1 Car. 1; Latch. 144, S. C.; Noy, 82, S. C.

It is laid down in a subsequent case, that an action of trover does lie in such case; for that, as the party robbed has done his duty to the public in prosecuting the thief, he ought not to be deprived of the remedy by an action of trover for the injury to himself.

2 Roll. Abr. 557, (Y), pl. 24, Dawkes v. Cavenah, Mich. 1652.

The reason given in the latter case is by no means conclusive; for what purpose would it answer, that a person robbed should be at liberty to bring an action of trover, when he has a speedier remedy under the statute?

[However, as the owner, after conviction of the felon, has a right to restitution of the goods in specie, it should seem, that he would be entitled to recover damages in trover against any person who is fixed with the goods at that time, and refuses to deliver them; for then the goods are converted to the prejudice of the owner. Horwood v. Smith, 2 Term R: 755.

It is said in one book, that an action of trover does not lie, after the person who took the goods had been indicted for felony and acquitted; for that, as *omne majus trahit ad se minus*, the conversion is merged in the felony.

Bro. *Tresp.* pl. 415. || But in such case it seems clear trover would lie, unless the owner of the goods colluded in procuring the acquittal. Crosby v. Leng, 12 East, 409.||

But in other books it is laid down, that if J S have been acquitted upon an indictment for feloniously taking the goods of J N, an action of trover lies; because, as the taking does not in this case appear to have been felonious, it is reasonable that J N should recover damages for the conversion of his goods.

1 Jones, 150, Markham v. Cobb; Latch. 144; Noy, 82; Sty. 346.

[Where goods were obtained from a person by fraud, and afterwards pawned to another without notice, and the owner prosecuted the offender to conviction, and got possession of his goods, it was holden, that the pawnee might maintain trover for them. The court said, that this was distinguishable from the case of felony; for there, by a positive statute, the owner, if he prosecutes the offender to conviction, is entitled to restitution:

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but that does not extend to this case, where the goods were obtained by fraud.

Parker v. Patrick, 5 Term R. 175.] ¶Vide Noble v. Adams, 7 Taunt. 59; and *antè*, 640, note.¶

¶In this case it seems the property was considered to vest in the party obtaining the goods by fraud. But it seems that if A obtain goods of B on credit, fraudulently intending at the time of the contract not to pay for them, no property passes, and B may maintain trover against A for them.

Ferguson v. Carrington, 9 Barn. & C. 59; and see 3 Camp. 352, *acc.*, and 1 Esp. Ca. 430.¶

An action of trover does not lie for the conversion of goods bought in market overt, although they were stolen; for by the sale in market overt the property in the goods was vested in the vendee.

1 Leon. 223, Vandrink v. Archer. [Vide *suprà*.] ¶3 Atkins, 44; 2 Term R. 376; 2 Camp. 336, n.¶

¶Trover lies for a promissory note, a title-deed, a certificate of stock, or a book of records.

Kingman v. Pierce, 17 Mass. 247; Day v. Whitney, 1 Pick. 503; Towle v. Lovett, 6 Mass. 394; Jarvis v. Rogers, 15 Mass. 389; Savburg v. Stearns, 21 Pick. 148; Stebbins v. Jennings, 10 Pick. 172; Todd v. Crookshanks, 3 Johns. 432; Burn v. Morris, 4 Tyr. 485; 2 C. & M. 579.¶

A, who came to the possession of a bank-note, the property of B, by robbing the mail, parted with it to C for a valuable consideration. Payment of the note being afterwards refused at the bank, C brought an action of trover against the cashier of the bank who had signed it. Upon a case reserved, it was holden, that the action was maintainable: and by Lord Mansfield, C. J.—If a man did not in every case acquire a property in a bank-note by giving a valuable consideration for it, an end would soon be put to the circulation of bank-notes.

MS. Rep. Miller v. Race, Hil. 31 G. 2, in B. R.; [1 Burr. 452, S. C.;] ¶2 Kenyon, 189, S. C. See Grant v. Vaughan, Burr. 1516; Peacock v. Rhodes, Doug. 632; applying the same doctrine to bills of exchange endorsed in blank, and notes payable to bearer; and see King v. Milsom, 2 Camp. 5. But in later cases it has been held, that if a party taking lost or stolen notes, bills, &c., for valuable consideration, take them under circumstances which ought to excite the suspicions of a careful and prudent man, he cannot recover the value of them; Gill v. Cubitt, 3 Barn. & C. 466, overruling Lawson v. Weston, 4 Esp. Ca. 56; Down v. Halling, 4 Barn. & C. 330; Snow v. Peacock, 3 Bing. 406; Snow v. Saddler, *Ibid.* 610; or resist an action for their value at suit of the original owner. And see De la Chaumette v. Bank of England, 9 Barn. & C. 208.¶

{A endorsed a bill, drawn in his favour, and accepted, to B, in order that he might raise money for A by negotiating it. B, instead of getting the bill discounted, gave it to C, from whom it came into the hands of D, without consideration, two years after it was due. A brought trover against D for the bill; and two objections were made against his recovering; that, by endorsing the bill, he had parted with the legal property in it,—and that the bill itself was of no value. But the court held that he could recover: the endorsement was merely for the purpose of enabling B to raise the money, and was not absolute, but conditional; A might demand it again from him or from any person into whose hands it came dishonestly: and as to its being worth nothing, it was of importance to the plaintiff to get it back.

5 Bos. & Pul. 170, Goggerly v. Cuthbert.

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If A give his note to two persons, and afterwards pay the money to one of them, taking a receipt in full, the note being in the hands of the other, A cannot maintain trover for it; for by the payment and receipt it was completely discharged, so as to be of no value, and it did not belong to A.

3 Johns. Rep. 432, *Todd v. Crookshanks*.)

An action of trover lies, although the goods converted be afterwards restored to the owner; for the restoration only goes in mitigation of damages.

2 Roll. Abr. 5, (L), pl. 1; 1 Leon. 223; 6 Mod. 212; 1 B. N. P. 46; 3 Camp. 396; || 2 Greenfield Bank v. Leavitt, 17 Pick. 1; Gibbs v. Chase, 10 Mass. 125; Wheelock v. Wheelwright, 5 Mass. 104; Rogers v. Crombie, 4 Greenl. 274; Murray v. Burling, 10 Johns. 172. §

§ To maintain trover, the conversion must be wrongful; when a person obtains possession of property lawfully, and delivers it up on demand, damages cannot be recovered against him in trover, for having taken it.

Chandler v. Partin, 2 Rep. Const. Ct. 72; *Quay v. M'Ninch*, 2 Rep. Const. Ct. 78.

Trover lies for cutting green corn and carrying it away.

Nelson v. Burt, 15 Mass. 204.

A mortgagee cannot maintain trover for trees cut down by a mortgagor in possession.

Peterson v. Clark, 15 Johns. 205.

When the owner of adjoining land had worked coal-mines within the land of plaintiff; held, that plaintiff could support trover for the coals.

Martin v. Porter, 5 Mees. & W. 352.

The forcible taking possession of a house and fixtures, by the assignee of a term in the house, is not a conversion of such fixtures.

Longstaff v. Meagoe, 4 Nev. & M. 211. §

|| If A exchange his watch with B for a pair of candlesticks, and B warrant the candlesticks to be silver, and they turn out to be of base metal, A cannot sue B in trover for his watch; for the watch remains the property of B; and A must sue on the warranty of the candlesticks.

Emanuel v. Dane, 3 Camp. 299. ||

§ Where one takes raw materials to work up for another on shares, and agrees to give security to the owner for his share, payable at a future day, and, before doing so, disposes of the property, the owner may maintain trover for his share of the property.

Rightmyer v. Raymond, 12 Wend. 51.

Trover does not lie for goods attached, for they are in the custody of the law.

Jenner v. Jolliffe, 6 Johns. 9; S. C., 9 Johns. 381.

Where property is derelict and abandoned by the owner, it belongs to him who first finds it and reduces it to possession; and the original owner cannot maintain trover for it.

Wyman v. Hulburt, 12 Ohio, 81.

If A has a box in his possession, containing papers belonging to a deceased person, and send the box with its contents to his solicitors, with direction to give the box and papers to the executor, on his giving an inventory of them and a receipt; held, that trover could be maintained against the solicitors, if they refuse to deliver the box and papers to the

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executor, he refusing to give an inventory and receipt, though the solicitors offered to give them up if the executor would do so.

Cobbett v. Clutton, 2 C. & P. 471.*g*

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If J S take away a beast, which he had bailed to J N for a time certain, before the expiration of the time, he is not liable to an action of trover; for the person who has only a special property in a personal chattel can never maintain this action against the person in whom the general property is, the remedy of the bailee being an action upon the case.

Bro. Tresp. pl. 92; *sed vide Roberts v. Wyatt*, 2 Taunt. 268.¶

If J S kill the beast of J N, which was bailed to him generally, an action of trover does not lie against J S; for by the bailment a general confidence was placed in him, and the remedy for an abuse of such confidence is an action upon the case.

Bro. Tresp. pl. 295; 5 Rep. 14; *Cro. Eliz.* 784. ¶But it would seem that trover does lie in such case. *Vide ante*, tit. *Tresp.*, p. 443.¶

But if J S kill the beast of J N, which was bailed to him for a particular purpose, as to plough his land, he is liable to this action; because a general confidence was not placed in him by the bailment.

1 Inst. 57; *Bro. Tresp.* pl. 295; 5 Rep. 13; *Cro. Eliz.* 780.

If a servant, who was trusted to sell the goods of his master, carry them away, an action of trover lies against him; inasmuch as the confidence placed in him extended only to selling the goods.

1 Leon. 87, *Glosse v. Hayman*.

If a servant, who has by the command of his master lawfully distrained a horse, use it, the servant is liable to an action of trover; because the command did not extend to the using of the horse.

Bro. Tresp. pl. 211.

A pawned goods to B, who was known to be a servant employed by C, a pawnbroker, in the way of his trade. A afterwards tendered to B the money due upon the goods, and demanded the goods. B did not deliver them, but said they were sold. It was ruled by Holt, C. J., that an action of trover lay against C.

Ld. Raym. 738, *Jones v. Hart*; *Salk.* 441.

It is laid down in one case, that an action of trover does not lie against a servant, for an unlawful intermeddling with the goods of any person by the command of his master, unless the intermeddling be such as amounts to a trespass; because the master is in such case answerable. It is moreover said, that it would be very inconvenient, if it should be always necessary for a servant to be satisfied of his master's right to goods, before he obeys his command as to the intermeddling therewith.

2 Mod. 244, *Mires v. Soleby*.

But it is laid down in another case, that if a servant unlawfully intermeddle with the goods of any person, the servant, although it be by the command of his master, is liable to an action of trover; for that the command of a master neither justifies nor excuses his servant in doing a tortious act.

Sayer, 41, *Perkins, assignee of Hughes, v. Smith*, [1 Wils. 328;] *Acc. Stephens v. Elwall*, 4 Maul. & S. 259; and see 5 Barn. & A. 247; 9 Barn. & C. 591.¶

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It is said to have been holden, that if a sheriff, who has seized goods under a writ of *fieri facias*, sell them, after he is out of his office, he is liable to an action of trover. But from two other reports of the same case it appears to have been holden, that this action would not lie in such case against the sheriff. And in another book, wherein the case is cited, it is said, that Yelverton is mistaken in his report; for that upon examining the roll it appeared to have been determined as it is reported by Moor and Croke.

Yelv. 44, Ayer v. Aden; Moor, 757; Cro. Ja. 53; 2 Saund. 47, Wilbraham v. Snow.

It has been holden, that an action of trover lies against a sheriff for selling, after an assignment by the commissioners, the goods of a bankrupt, which had been seized by him under a writ of *fieri facias* after the act of bankruptcy: and by Lord Mansfield, C. J.—The sheriff was not liable to this action for seizing the goods, (a) inasmuch as he might be ignorant of the act of bankruptcy; but the sale of them after the assignment by the commissioners, of which he was bound to take notice, was a conversion. (b)

MS. Rep. Cooper v. Chitty, Mich. 30 G. 2, in B. R.; [1 Burr. 20, S. C.;] 1 Blac. R. 68; 1 Kenyon R. 395, S. C. [(a) The sheriff was not liable to an action of *trespass* for seizing the goods. Smith v. Milles, 1 Term R. 475.] [(b) However it has since been held that the sheriff is liable in trover, though he seize, sell, and pay over the money before any commission issue, and without notice of the previous act of bankruptcy. Potter v. Starkie, cited 4 Maul. & S. 260; Price v. Helyar, 4 Bing. 597; and see Glasspoole v. Young, 9 Barn. & C. 696.]

J S, the plaintiff in an action against J N, had received of a sheriff the money, for which the goods of J N, seized under a writ of *fieri facias* after he had committed an act of bankruptcy, had been sold. It was holden, that an action of trover lay against J S, without making the sheriff a defendant.

Stra. 996, Rush, assignee of Ryland, v. Baker, [Bull. N. P. 41.] [If the sheriff and the bailiff are jointly sued with J S in trover, and damages recovered, J S is not liable for contribution to the bailiff, nor to indemnify him; but the levy money may be recovered from J S by the bailiff, as money had and received, being paid under a mistake. Wilson v. Milner, 2 Camp. 451; and see Ry. & Moo. Ca. 116.]

{And if a creditor accompany the sheriff's officer in levying an execution which is afterwards avoided by a commission of bankruptcy, trover may be maintained against him by the assignees, though he has never received either the goods or their value from the sheriff.

1 Bos. & Pul. 369, Menham v. Edmonson.}

If a stranger have officiously assisted a sheriff or his officer in the execution of a writ of *fieri facias*, which issued upon a regular judgment, he is not liable to an action of trover; for it is not only lawful, but it is the duty of every man to assist in the execution of such writ.

10 Mod. 24, Templeman's case.

An action of trover does not lie against a sheriff or his officer, or against any person who by the command of either of these assists in the execution of a writ of *fieri facias*, although there were no judgment to warrant the issuing of the writ; for neither of these has done more than obey the writ, which it was the duty of every one of them to do.

12 Mod. 178, Britton v. Cole; 2 Johns. 114.

But if a stranger have officiously assisted a sheriff or his officer in the execution of such writ, he is liable to this action; for, as he acted officiously,

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it was incumbent upon him to take care that there was a judgment to warrant the issuing of the writ.

12 Mod. 179, *Britton v. Cole*; *Carth.* 445.

An action of trover does not lie against a sheriff or his officer, or against any person, who by the command of either of these assists in the execution of a writ of *fiery facias*, although the judgment upon which the writ issued were irregular; because the fault in such case is in the court or some officer of the court. But, if a stranger have officiously assisted a sheriff or his officer in the execution of such writ, he is liable to this action; for, as he acted officiously, it was incumbent upon him to take care that the judgment was regular.

Stra. 509, *Philips v. Biron*; *Raym.* 73. ¶ *Vide antè, Trespass*, p. 475. ¶ Trover will lie against a constable who converts to his own use goods levied on by virtue of an execution. *Mershom v. M'Cullough*, 1 *Penning.* 416.8

[An action of trover will lie against persons distraining goods for a poor's rate, in the hands of the representatives of the person liable to pay it, if no previous demand has been made upon the representatives.

Stevens v. Evans, 2 *Burr.* 1152.]

It appeared in evidence, that the plaintiff had left some lottery tickets with a goldsmith, in order to receive the money due upon them for the use of the plaintiff: that a certain number of tickets in the same lottery had been left by the defendant with the goldsmith, who gave the defendant a note to deliver the same number of tickets to him; and that the goldsmith afterwards delivered as many of the plaintiff's tickets to the defendant as were mentioned in the note. It was holden, that an action of trover lay against the defendant for the conversion of these tickets. And by the court—The lottery tickets being left with the goldsmith for the special purpose of receiving the money thereupon due for the plaintiff's use, he had no power to dispose of them; and, consequently, as the property was not changed by the delivery of the tickets to the defendant, he is liable to this action.

Salk. 283, *Ford v. Hopkins*.

In a special verdict it was stated, that J S, the owner of jewels, had bailed them sealed up in a bag to a banker for safe custody only; that the banker broke open the seal, took the jewels out of the bag, and pawned them to J N for 300*l.* It was holden, that an action of trover lay against J N, for the conversion of the jewels. And by the court—The plaintiff's jewels being delivered to the banker for safe custody only, his breaking open the bag and taking them out was a trespass; and consequently the defendant, although he came honestly to the possession of the jewels, is liable to this action; because they were delivered to him by a person who had no property in them.

Stra. 1187, *Hartop v. Hoare*; ¶ 3 *Atk.* 44, *S. C.*¶

¶ If a tenant for life of plate pawn it, the remainder-man, after demand and refusal, may maintain trover for it against the pawnee, although he had no notice of the settlement.

Hoare v. Parker, 2 *Term R.* 376.

If goods stolen are pawned, the owner may maintain trover against the pawnbroker.

Packer v. Gillies, 2 *Camp.* 336, n. See also *Hooper v. Ramsbottom*, 6 *Taunt.* 12.¶

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The wife of a bankrupt delivered some plate, left with her by her husband at the time of his absconding, to a servant, that he might borrow money thereupon. The servant went with the plate to the door of a banker's shop, and there delivered it to the defendant, who went into the shop and pawned it in his own name, and immediately went back to the wife and delivered the money to her. It was holden, that, as neither the wife nor the servant had a power of disposing of the plate, this was a conversion in the defendant, for which he was liable to answer to the assignees of the husband.

Stra. 813, *Parker v. Godin*. [See *Smith v. Plomer*, 15 *East*, 607.]

[But, where a bankrupt's wife brought money of the bankrupt to the defendant, who purchased India and South Sea bonds with it, some of which the assignee seized, and accepted as part of the bankrupt's estate; it was adjudged, that the assignee could not maintain trover for the money paid for the others, since he could not avow the act of purchasing as to part, and disavow it as to the rest; assent to the act at one moment, and complain of it as tortious at another.

Wilson v. Poulter, 2 *Stra.* 859; 1 *Barnard.* 77, 118, 136, 142, 284, *S. C.* In the latter book, the court are said to have doubted whether the purchase of the bonds was a conversion under the circumstances of this case.]

It is laid down, that if A take the goods of B illegally, and C afterwards take them illegally from A, B cannot maintain an action of trover against C; for that, by the first taking, notwithstanding it was a tortious one, the property of B was divested.

Bro. Tresp. pl. 256, pl. 329, pl. 359.

But it is said in one book, that A does not in such case acquire any property in the goods by the first taking, and, consequently, that B may maintain an action of trover against C.

1 *Sid.* 438.

If a factor, who has sold the corn of J S, and received the money for it, refuse to pay the money to J S, an action of trover lies against him.

Cro. Eliz. 638, *Holiday v. Hickes*. [But if the factor be authorized to sell, it seems trover will not lie in such case, but that J S should sue for the money as money had and received, &c. *Stiernel v. Holden*, 4 *Barn. & C.* 5.]

A servant, who had a general authority to receive and pay money for his master, after receiving some money due to his master from J N, gave it to J S, and delivered it to him. It was ruled, that an action of trover lay for the master against J S; and by *Holt, C. J.*—As the receipt of the servant was a discharge to J N, the money was received to the use of the master; and consequently the possession of the servant must be intended to have been the possession of the master.

Salk. 289, *Anon.*; *Cro. Eliz.* 638.

If a carrier, to whom goods have been delivered to be carried, be robbed of the goods, or lose them through negligence, he is liable to an action upon the case; but an action of trover does not lie against him; because he has not in either case been guilty of a mal-feasance.

1 *Roll. Abr.* 2, pl. 1, pl. 2, pl. 3; *Hob.* 17; *Cro. Ja.* 330; *Salk.* 143; 12 *Mod.* 462.

[It is settled that trover does not lie against a carrier for a bare non-delivery. But it lies if, the goods being in his possession, he refuse to deliver them on demand.

4 *Esp. Ca.* 157, *Dewell v. Moxon*; 1 *Taunt.* 391.

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His assertion that he has delivered the goods to the consignee, which is false, is no evidence of conversion.

Attersoll v. Briant, 1 Camp. 409.||

But if a carrier, to whom goods have been delivered to be carried, sell the goods, or refuse to deliver them upon the money due for carriage being paid or tendered, an action of trover lies against him.

Salk. 655, Anon.

β A, the owner of a chattel, delivers it to B, for sale ; B, instead of selling it, appropriates it to his own use ; held, that A may maintain trover.

Barton v. White, 1 Har. & Johns. 579.γ

||So, also, if he deliver them to a wrong person, though by mistake.(a) And it lies against a warehouseman under similar circumstances,(b) or where he delivers them under a forged order.(c) And if the carrier refuse to deliver the goods without mentioning his lien, he cannot afterwards set up a lien as a defence to the action.(d)

(a) Peake's Ca. 68 ; Stephenson v. Hart, 1 Bing. 476. (b) Devereux v. Barclay, 2 Barn. & A. 702. (c) Lubbock v. Inglis, 1 Stark. Ca. 104. (d) Boardman v. Sill, 1 Camp. 410.||

It is said to have been ruled by Holt, C. J., that if the goods delivered to be carried were not delivered to the carrier himself, but to his book-keeper, an action of trover does not lie against the carrier, unless the goods be afterwards converted by him.

Ld. Raym. 792, Anon., Trin. 1 Ann.

But the contrary was ruled in a subsequent case. In an action of trover against a book-keeper, it appeared, that the goods were delivered to him to be carried by his master's wagon. It was holden, that the carrier himself is in such case liable to answer for the conversion of the goods.

2 Barnard. 234, Harvey v. Syliard, Hil. 6 G. 2.

And the latter case agrees with what is laid down in another case. In an action of trover against a master of a hackney-coach it appeared, that the goods were delivered to his servant who drove the coach ; and the question was, if the master was answerable for the conversion of them ? It was ruled that he was not ; and by Holt, C. J.—It would be hard if the master of a hackney-coach, who is not paid for the carriage of goods, should be answerable for the conversion of them ? There is a wide difference betwixt the case of a hackney-coach and that of a stage-coach. If a passenger in a stage-coach, who is allowed to carry goods of a certain weight, deliver goods not exceeding that weight to the driver of the coach, the master of the coach is answerable for them ; because the money he receives is paid for the carriage of the goods as well as of the passenger. It has been holden, even in the case of a stage-coach, that if a passenger carry goods of a greater weight than he is allowed to carry, the master of the coach is not answerable for the over-weight, unless it be paid for.

Skin. 625, Middleton v. Forder.

An action of trover does not lie against a carrier for refusing to deliver goods, unless the money due for the carriage have been paid or tendered ; because, as a carrier is by law bound to carry the goods delivered to him, it is highly reasonable, that he should have a right to detain them, until the money due for the carriage is paid or tendered.

Salk. 654, Hartford v. Jones.

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||But if the carrier refuse to deliver the goods on a different ground, he cannot afterwards set up his lien for carriage as a defence to an action.

Boardman v. Sill, 1 Camp. 410, n.]

An action of trover does not lie against an innkeeper for detaining the horse of his guest, unless the money due for keeping the horse have been paid or tendered for ; as an innkeeper is by law bound to receive the horse of a traveller, in case his stable be not full, it is very reasonable that he should be paid for keeping the horse before it is taken away.

2 Show. 161, 179 ; Ld. Raym. 868.

It was holden by three judges, contrary to the opinion of Holt, C. J., that an innkeeper may detain a horse, although the man who put the horse into the stable have not lodged in his house ; for that the putting up of his horse, from which the innkeeper has a profit, makes the man a guest.

Ld. Raym. 868, York v. Greenaugh.

||A house of public entertainment in London, where beds, provisions, &c., are furnished to all persons paying for them, but which is called a tavern and coffee-house, and not frequented by coaches or wagons, and has no stables, is to be considered an inn, and the owner is subject to the liabilities of an innkeeper, and has a lien for goods of his guest for payment of his bill.

Thompson v. Lacy, 3 Barn. & A. 283.]

If a stolen horse be put up at an inn, an action of trover does not lie against the innkeeper for detaining the horse from the owner, unless the money due for keeping the horse have been paid or tendered ; because the innkeeper was bound to receive the horse, and it was impossible for him to know whether his guest came honestly by it.

Ld. Raym. 867, York v. Greenaugh. ||See Johnson v. Hill, 3 Stark. Ca. 172.]

||A livery stable keeper has not by law a lien for the keep of horses, unless by special agreement. But if he have such lien by agreement, and the owner of the horses fraudulently take them out of his possession to defeat the lien, the livery stable keeper may retake them without force, and his lien will revive.

Wallace v. Woodgate, Ry. & Moo. Ca. 193 ; and see 8 Taunt. 149.]

An action of trover does not lie against a farrier, for refusing to deliver a horse which has been shod by him, unless the money due for the shoeing have been paid or tendered,

Yelv. 67.

A tailor is not liable to an action of trover, for refusing to deliver a coat made by him to the person from whom he received the materials for it, unless the money for making the coat have been paid or tendered.

Hob. 42, Cooper v. Andrews.

||A agreed to give B, a coachmaker, 100*l.* for a coach, by four bills of 25*l.*, and that B should have a claim on the coach till the debt was paid. The coach was delivered to A, and the bills to B, and the first was not paid when due. A died, and his administratrix sent the coach to B to have the wheels repaired, when B detained it for the unpaid bills. The administratrix brought trover, and it was held that the agreement operated as a mere personal license to B to take the coach if the bills were unpaid, that it was not transferable, and that the coach having vested in the administratrix by operation of law, B was not justified in detaining it.

Howes v. Ball, 7 Barn. & C. 481.]

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It was decreed by Strange, Master of the Rolls, that a factor, who had paid money for insuring the goods of his principal, and had been at other expense concerning them, had such a lien upon the goods that a court of equity would not oblige him to deliver them before the money due was paid or tendered. The factor, not being satisfied with this decree, appealed to the Chancellor; and the appeal came on before Lord Hardwicke, in February, 1755. His lordship, after taking time to consider, and sending for some merchants to inform himself of the nature of a factor's business, decreed, that a factor has a lien upon the goods of his principal, so long as the goods continue in his possession, not only for what is due for his trouble and expense concerning them, but also for all money due to him from his principal.

MS. Rep. Canser v. Wilcox; [1 Burr. 494, S. C.] ||See this case fully reported by name of Cruger v. Wilcocks, 1 Kenyon, R. 32; and see Ambler, 252, S. C.||

Another decree to the same effect was pronounced by Lord Hardwicke, a few months after.

MS. Rep. Gardiner v. Coleman; [1 Burr. 494, S. C.]

[So in the case of packers, there being evidence that it was usual for them to lend money to clothiers, and the cloths to be a pledge, not only for the work done in packing, but for the loan of money likewise; Lord Hardwicke held, that according to this usage, *packers* were in the nature of *factors*, and as such entitled to a lien upon the goods, not only for incidental charges, but as an item of *mutual account* for the general balance due to them.

Ex parte Deeze, 1 Atk. 228; *Ex parte Dumas*, Ibid. 234.

But it is otherwise where goods are delivered to a tradesman or manufacturer for a particular purpose: as corn to a miller to be ground, or cloth to a dyer to be dyed; for these have only a specific lien upon the goods for the price of grinding and dyeing.

Ex parte Ockenden, 1 Atk. 235; *Green v. Farmer*, 4 Burr. 2214; 1 Bl. Rep. 651, S. C. {See 6 East, 523, n.} ||Vide, as to the subject of Liens, Montagu on Lien; and see the cases collected, Petersdorff's Abridg. vol. xiii.||

{A common carrier, though he has a lien on the particular goods for the price of their carriage, has not, by the common law, a lien on them for the general balance of his account.

6 East, 519, *Rushforth v. Hadfield*; 7 East, 224, S. C.

Such a general lien, where it is not given by the common law, can arise only from an express or implied contract. The contract may be implied, either from the particular mode of dealing previously between the same parties on the footing of such a lien, or from an usage of the trade so general and notorious that a jury may fairly presume that the parties knew of it, and made their agreement with reference to it. Under such circumstances, a common carrier may be entitled to a general lien. But if it is claimed on the ground of a general usage of the trade, the evidence of such usage should be strong, and the instances of it numerous, important, and not recent.

4 Burr. 2220; 6 Term, 14; 6 East, 519; 7 East, 224; 3 Bos. & Pul. 44, n., 46; 4 Esp. Rep. 53, *Savil v. Burchard*. See 6 Term, 17; 1 East, 4; 1 Cain. 45.

And if an usage is established for carriers to retain goods on a lien for the general balance of account between them and the consignees, it will not affect the right of the consignor to stop the goods *in transitu*. The

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carrier derives his right from the consignee, and can have no greater right than the consignee himself has.

3 Bos. & Pul. 42, *Oppenheim v. Russell*.

So a carrier, who, according to the usage, is to be paid by the consignor, cannot retain the goods against the consignee for a general balance due to him from the consignor.

5 Bos. & Pul. 64, *Butler v. Woolcot*.)

||An agreement entered into at a public meeting by a number of dyers, bleachers, &c., that they would not receive goods to be dyed, &c., except on condition of having a lien on them for their general balance, is legal; and any one who with notice of it sends goods to be dyed, &c., must be taken to assent to those terms, and cannot demand his goods without paying his general balance.

Kirkman v. Shawcross, 6 Term R. 14.||

An action of trover does not lie against the saver of goods thrown on shore, which were part of the cargo of a ship that had been wrecked, unless a satisfaction have been made or tendered for the trouble or expense of saving them; it being highly reasonable that the party who has saved goods, and has perhaps done it at the peril of his life, should have a lien upon the goods for his trouble or expense.

Ld. Raym. 393, *Hartford v. Jones*.

[But where a quantity of timber, placed in a dock on the bank of a navigable river, was accidentally loosened, and carried by the tide to a considerable distance, and left at low water upon a towing path, where A, finding it, voluntarily conveyed it to a place of safety, beyond the reach of the tide at high water; it was determined, that the owner of the timber might maintain trover for it against A, without tendering any thing to him by way of compensation for the trouble and expense to which he had been put in the salvage.

Nicholson v. Chapman, 2 H. Bl. 254;] [and see *Sutton v. Buck*, 2 Taunt. 302.]

The lord of a manor, who had seized a beast as an estray, was at the expense of keeping it some time after he had proclaimed it. Within a year and day after the proclamation, the owner of the beast came and demanded it, but did not make or tender any satisfaction for the keeping. Upon the refusal of the lord to deliver the beast, an action of trover was brought against him. It was holden, that as the owner of the beast had not made or tendered a satisfaction for the keeping, the action did not lie.

2 Roll. Abr. 92, *Taylor v. James*; [Bull. N. P. 45, S. C.]

It was ruled by Holt, C. J., that if an attorney, who has been employed to draw and attend the execution of a deed, do not deliver it upon demand, an action of trover lies against him; for that as he may bring an action for the money due for drawing and attending the execution of the deed, he cannot detain it, although the money have neither been paid nor tendered.

Ld. Raym. 738, *Anon*. [It is now settled, that an attorney has a lien upon his client's papers, &c. Vide *suprà*, Vol. i. p. 503.] tit. *Attorney*.

The plaintiff, who was master of a ship, had brought home a small parcel of elephants' teeth on his own account, and a large parcel upon the account of the defendant, who was the owner of the ship. The defendant entered both parcels at the custom-house, paid the duty for both, and both were delivered to him. Upon his refusing to deliver to the plaintiff

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his parcel, an action of trover was brought; and the question was, whether, as the plaintiff had neither paid nor tendered his part of the duty, the action could be maintained? It was ruled that it could; and by Eyre, C. J.—The defendant had no right to detain the plaintiff's parcel, notwithstanding the money paid by him as duty for it was neither paid nor tendered; for he might have brought an action for the money, or he may now give evidence of the money paid, and then it may be deducted out of the plaintiff's damages. The reporter adds, that the latter was done.

Stra. 651, *Stone v. Lingwood*. [Upon the argument of *Green v. Farmer*, 4 Burr. 2218, Lord Mansfield declared that this case was not law.]

||A party cannot acquire a lien by his own wrongful act: and if the defendant obtains possession as a mere wrongdoer, it is never necessary for the owner of goods to tender him an indemnification for expenses incurred by him in obtaining such wrongful possession.

Lempriere v. Pasley, 2 Term R. 485; and see 1 Camp. 12.

If a party, when goods are demanded of him, claim to retain them as his own property, and make no mention of a lien, it appears that he cannot afterwards resort to a lien, if he have one, in his defence.

Boardman v. Still, 1 Camp. 410, n.||

A carpenter, after working some time in one of the queen's yards, refused to work any longer. Hereupon the surveyor of the yard refused to let him take away his tools. An action of trover being brought against the surveyor, he gave in evidence an usage for the surveyors of the queen's yards to detain the tools of workmen, in order to compel them to continue working in the yards until the queen's work is finished. It was holden, that the action lay; and no regard was paid by Holt, C. J., before whom the cause was tried, to the usage.

6 Mod. 212, *Baldwin v. Cole*.

||A calico printer is entitled, after having discharged his head colourman, to the book in which that servant has entered the processes for mixing colours during his service, although many of the processes were the invention of the colourman himself; and, consequently, the colourman cannot sue in trover for the book.

Makepeace v. Jackson, 4 Taunt. 770.||

If a person, who would otherwise have a right to detain the personal chattel of another, for the trouble or expense he has been at concerning it, contract to be paid a sum certain for the trouble or expense, he thereby waives the right of detaining the chattel.

2 Roll. Abr. 92, (M), pl. 2, pl. 6; Cro. Car. 271; Yelv. 66.

An agreement was entered into, whereby ten shillings and sixpence was to be paid to a farrier for curing a mare; and a reasonable sum for keeping the mare until she should be cured. The owner of the mare, as soon as she was cured, tendered ten shillings and sixpence, and demanded the mare. The farrier refused to deliver the mare, unless a gross sum was paid for the cure and keeping of the mare; and an action of trover was brought. It was holden, that the action lay. And by Ryder, C. J.—As ten shillings and sixpence were tendered, the defendant had no right to detain the mare on account of the cure. It is not necessary to give any opinion as to the right of a farrier to detain a beast for the money due for keeping it until it is cured; because, if a farrier have in the general such

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right, it was in the present case waived by the special agreement to be paid a reasonable sum for the keeping.

Sayer, 224, *Brenen v. Currint*.

[Trover is not maintainable against an executor for a conversion by his testator; the form of the plea is a decisive objection to it.

Hambly v. Trott, Cowp. 371;] ¶and see 1 Will. Saund. 216 a, and 2 New R. 370.]

{One joint-tenant, or tenant in common, or parcener, cannot bring trover against his companion for a thing still in his possession, because the possession of one is the possession of both.

Salk. 290; Buller, 34; Co. Litt. 200; 1 Day, 301, *Webb v. Danforth*.

But if one tenant in common destroy the thing in common, the other may bring trover; and, therefore, where one tenant in common of a ship took it away, and sent it to the West-Indies, where it was lost in a storm, Lord C. J. King left it to the jury, whether this were not a destruction by the defendant; and the jury found it so accordingly: and, it being afterwards moved in court, the court unanimously agreed to the Chief Justice's direction, and would not grant a new trial.

Buller, 34, 35, *Barnardiston v. Chapman*; 4 East, 121, 122, S. C.

And the sale of the chattel by one tenant in common, has been holden to be equivalent to a destruction of it; and for a sale, therefore, trover will lie by one tenant in common against another.

3 Johns. Rep. 175, *Wilson & Gibbs v. Reed*; *sed vide* 4 East, 110, 128, *Heath v. Hubbard*.

A sale of the proportion of one part-owner of property, which is {1} divisible, (in this case it was a cargo of salt,) with the consent and advice of the other, severs the tenancy in common; and on a refusal by the other part-owner to deliver such proportion, the vendee may maintain trover for it against him.

2 Cain. 166, *Selden v. Hickock*. {1} Vide 2 Johns. Rep. 468, *St. John v. Standing*; 1 East, 363, *Smith v. Stokes*.)

¶Trover will lie against a corporation; and it seems not to be necessary that a conversion of goods by their servants should be authorized under the corporate seal; but supposing this necessary, such an authority will be presumed after verdict.

Yarborough v. Bank of England, 16 East, 5; *Duncan v. Proprietors of Surrey Canal*, 3 Stark. Ca. 50; *¶ Ingersoll v. Van Bokkelin*, 7 Cowen, 670. *¶*

¶ In an action of trover against two defendants, a demand upon and refusal by a person who claimed property and his vendee, who together had possession, was held to prove a joint conversion.

Chamberlain v. Shaw, 18 Pick. 278. See *Strickland v. Barrett*, 20 Pick. 415.

Trover cannot be sustained against two without evidence of a joint tort, and if property has been bailed by two, a demand and refusal by one is not evidence of a conversion by both.

White v. Demary, 2 N. H. Rep. 546.

Trover lies against an infant, though the property which is the subject of the action were committed to him under a contract.

Vasse v. Smith, 6 Cranch, 226. But see *Penrose v. Curren*, 3 Rawle, 351; *Wilt v. Welsh*, 6 Watts, 9; *Shenk v. Strong*, 1 South. 87, and *anté*, *Infancy and Age*, (H), Vol. v. p. 116.

(F) Of the Pleadings in an Action of Trover.

In North Carolina, trover lies against executors on a conversion of their testator.

M. Kinnie v. Oliphant, 1 Hayw. 4; *Decrow v. Moore*, 1 Hayw. 21; *Clark v. Kenan*, 1 Hayw. 308; *Avery v. Moore*, 1 Hayw. 362.*g*

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1. *Of the Declaration.*

In an action of trover for the conversion of letters patent, there was a verdict for the plaintiff. Upon a motion in arrest of judgment it was objected, that the plaintiff had not alleged in his declaration that he was possessed of the letters patent as of his own proper goods. Judgment was given for the plaintiff: And by the court—The plaintiff has alleged, that the defendant, knowing the letters patent to appertain to him, did convert them, which implies they were the property of the plaintiff. The reporter, indeed, adds, that the objection was not allowed to be good, because it was after a verdict. But it is not to be conceived, that the verdict could in such case make a difference; for, if a property in the plaintiff had not been either expressly or impliedly alleged, the declaration would have been defective in a matter of substance, and, consequently, the defect would not have been cured by a verdict.

Hardr. 111, Jones v. Winkworth.

But if the action be in the Court of Common Pleas, it is not necessary to allege in the count, that the goods were the property of the plaintiff, provided this be alleged in the writ; because the writ is in that court parcel of the declaration.

Sid. 187; Jones v. Pritchard, Lutw. 1510.

It is not necessary for the plaintiff in an action of trover to show in his declaration in what manner his property in the goods was acquired.

2 Bulstr. 288, Willamore v. Barford.

If it appear in the declaration in an action of trover that some of the goods were the property of the plaintiff at the time of the conversion, but this do not appear as to some other of the goods; and judgment be entered up generally; the judgment is erroneous; but, if the plaintiff, although the verdict be general, enter a *remittitur* as to the goods which do not appear to be his property, and enter up judgment as to the residue, the judgment is good.

2 Saund. 379, Pinkney's case.

The plaintiff in an action of trover alleged in his declaration, that he delivered the goods charged to have been converted to the defendant to be kept for him. It was objected, that the declaration was bad, because the plaintiff had not alleged a loss of the goods; but it was holden to be good.

Cro. Eliz. 781, Gumbleton v. Grafton.

The personal chattel, for the conversion of which an action of trover is brought, must be described in the declaration with a degree of certainty: for if this be not done, the defendant would not know how to prepare for his defence; nor would he be able, in case a second action should be brought for the conversion of the same chattel, to plead a recovery in the former action.

5 Rep. 34, Playter's case; 2 Inst. 435; Cro. Eliz. 817; 1 Ventr. 53; Salk. 628; Ld. Raym. 588, 1410; Stra. 637.

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But a less degree of certainty in describing the personal chattel is sufficient in the declaration in an action of trover after a verdict than upon a demurrer; inasmuch as the court will, after a verdict, intend that some defect of certainty in the declaration was supplied by evidence.

Cro. Eliz. 817, *Wood v. Smith*, 12 Mod. 3; *Ld. Raym.* 518, 1410.

In order to form a judgment of the degree of certainty necessary in describing the personal chattel for the conversion of which an action of trover is brought, it will be proper to mention the principal cases upon the point; which shall be ranged in order of time as they were determined.

The declaration in an action of trover, which charged the conversion of some fish, without showing the number or quality of the fish, was after a verdict holden to be too uncertain.

5 Rep. 34, *Playter's case*, Mich. 35 Eliz. ¶ But this defect would seem now to be cured after verdict, either at common law, Cro. Ja. 435, or by the stat. of Jeofails, 16 & 17 Car. 2, c. 8; and after a general demurrer, or judgment by default, by 4 Ann. c. 16, § 1, 2. See 2 Will. Saund. 74, note (1).¶

The declaration in an action of trover, which charged the conversion of a parcel of fish called ling, was upon a writ of error holden to be bad, because the quantity of the fish was not shown.

Cro. Eliz. 866, *Gramvel v. Robotham*, Mich. 43 Eliz. ¶ But see *contra*, 2 *Ld. Raym.* 991; 1 Mod. 289; 1 Lev. 301; 1 Vent. 106; and the cases collected 2 Will. Saund. 74 a.¶ The description of goods need not be very particular. *Vanhauken v. Wickam*, 2 South. 509.

The declaration in an action of trover, which charged the conversion of seven pieces of linen cloth, was holden to be bad, for want of showing the number of yards the pieces contained; for that the quantity of linen cloth contained in a piece is altogether uncertain.

2 Show. 433, *Hawes v. Randal*, East. 1 Jac. 1; ¶ but see 2 Will. Saund. 74 a.¶

In the declaration in an action of trover the conversion *uni risci*, Anglicè *a trunk full of linen*, was charged, and there was a verdict for the plaintiff with twenty pounds damages. Upon a motion in arrest of judgment, Houghton, J., was of opinion, that the declaration was not certain enough: but Lee, C. J., Dodderidge, J., and Chamberlain, J., were of opinion that it was; for that they would intend the damages to have been given for the trunk alone, and the plaintiff had judgment. A writ of error being brought, the judgment was affirmed.

Cro. Ja. 664, *Bancroft v. Coe*, Hil. 19 Jac. 1,

The declaration in an action of trover, which charged the conversion of two sheaves of corn, was holden to be bad; because the species of the corn was not shown.

Sty. 25, Anon., Pasch. 23 Car. 1; ¶ 1 Vent. 114.¶

The declaration in an action of trover, which charged the conversion of a library of books, was holden to be certain enough; although neither the number nor quality of the books was shown.

Mar. 60, *Hodges v. Simpson*, Mich. 15 Car. 1; ¶ but see 2 Saund. 74 a.¶

The declaration in an action of trover which charged the conversion *sez parcellarum plumbi cinerei*, Anglicè *pewter porringers*, was holden to be certain enough.

Sty. 199, *Graves v. Drake*, Hil. 1 Car. 2,

In an action of trover, the declaration, which charged the conversion of three ricks of hay, was after a verdict holden to be certain enough; notwithstanding the quantity of the hay was not shown.

1 Lev. 301, *West v. Davis*, Mich. 22 Car. 2; ¶ 1 Mod. 289, S. C.¶

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The plaintiff in an action of *assumpsit* declared upon a *quantum meruit* for a parcel of thread. The declaration was upon a writ of error holden to be good. And by the court—This manner of declaring would not be certain enough in an action wherein a thing is to be recovered in specie; but it is so in this action, or in an action of trover, because only damages are to be recovered in these actions.

1 Lev. 303, *Jenny v. Norris*, Mich. 22 Car. 2; ||and see *Copleston v. Piper*, 1 Ld. Raym. 191.||

The declaration in an action of trover, which charged the conversion of a ship, with guns and sails thereto belonging, was holden to be certain enough, although neither the number nor quality of the guns and sails were shown; because these are to be considered as appertaining to the ship.

Ld. Raym. 588, the case of *Boroughs v. Hale* there cited, Trin. 23 Car. 2.

The declaration in an action of trover, which charged the conversion of divers glass bottles, was after a verdict holden to be bad; because it did not show the number of bottles.

2 Lev. 176, *Hicks v. Pendarvis*, Mich. 28 Car. 2.

||But trover for *divers quantities* of chinaware, earthenware, and linen, without setting forth the particulars, was held good after judgment by default; and trover for “old iron” was held good after verdict.

Barnes, 276; *Talbot v. Spear*, Willes's R. 70.||

The declaration in an action of trover, which charged the conversion of a parcel of woollen yarn, was upon a motion in arrest of judgment holden to be too uncertain.

2 Lev. 195, *Wade v. Hatcher*, Trin. 29 Car. 2; ||*sed vide Jenny v. Norris, ante*, and 2 Stra. 809; Ld. Raym. 1529, *contrd.*||

The declaration in an action of trover, which charged the conversion of twenty bullocks and heifers, was upon a writ of error holden to be bad; because it did not show how many beasts there were of each kind.

1 Ventr. 317, *Davis v. Price*, Mich. 29 Car. 2.

The declaration in an action of trover, after describing divers utensils therein charged to have been converted with sufficient certainty, contained these words, *cum aliis utensilibus*. The declaration was holden to be bad, for want of showing how many, and of what kind, the utensils comprehended under the words *aliis utensilibus* were.

3 Lev. 18, *Blackhouse v. Moor*, Pasch. 33 Car. 2.

The declaration in an action of trover, which charged the conversion of ten weights, was after a verdict holden to be certain enough; although it did not show the quantity of the weights.

12 Mod. 3, *Hook v. Galloway*, Mich. 3 W. 3. ||See 2 Vent. 78.||

The declaration in an action of trover charged the conversion of seventy ounces of cloves, mace, and nutmegs, without showing how many ounces there were of each, or that they were all mixed together. This declaration was holden to be certain enough. And by the court—We will intend, that it was one parcel of these three spices mixed together.

Ld. Raym. 588, *Hartford v. Jones*, Trin. 12 W. 3; ||2 Salk. 654, S. C.||

The declaration in an action of trover, which charged the conversion of two bundles of flax, was, upon a motion in arrest of judgment, holden to be certain enough; although the quantity of flax was not shown.

Ld. Raym. 991, *Thornton v. Barnard*, Trin. 2 Ann.

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The declaration in an action of trover, which charged the conversion of fifty pieces or ends of deal boards, was holden to be certain enough; but the reason given for its being so holden, namely, that an end of a board is amongst workmen well known to mean a short piece, shows that the word piece, if it had stood alone, would not have been certain enough.

11 Mod. 66, Knight v. Barker, Mich. 4 Ann.; [2 Ld. Raym. 1219.]

The declaration in an action of trover, which charged the conversion *diversorum mercimoniorum*, Anglicè *earthenware*, was holden to be too uncertain.

Stra. 809, Anon., Trin. 10 Ann.

The declaration in an action of trover, which charged the conversion of a piece of tape, was upon a motion in arrest of judgment holden to be certain enough; although it was not shown how many yards the piece contained.

Stra. 738, Radley v. Rudge, Hil. 13 G. 1.

The declaration in an action of trover, which charged the conversion of a parcel of packcloths, wrappers, and cords, was upon a writ of error holden to be certain enough. And by the court—Courts of justice do not at this day require so much certainty as they formerly did in a declaration in an action of trover. The word parcel, which is used in this case, ought to be taken to mean an entire thing, and the same as the word bundle. The cases upon this point are not all to be reconciled; but we are of opinion that the declaration is certain enough.

Ld. Raym. 1529, Bottomley v. Harrison, Pasch. 1 G. 2; [2 Stra. 809, S. C.]

The declaration in an action of trover, which charged the conversion of a parcel of diamonds, was holden by the Court of Common Pleas to be certain enough. Upon a writ of error in the Court of King's Bench it was said that this case may well be distinguished from the case of Bottomley v. Harrison; for that in the latter case the word parcel was taken to mean an entire thing, and the same as the word bundle, but that in the present case, as every diamond is a distinct thing, the plaintiff ought to have shown the number of diamonds. The judgment was affirmed; and a writ of error being afterwards brought in the House of Lords, it was affirmed there.

Stra. 827, White v. Graham, Hil. 2 G. 2.

The declaration in an action of trover, which charged the conversion of fifty pieces of square timber, was upon a writ of error holden to be certain enough; although the quantity of timber which each piece, or which all the pieces contained, was not shown.

Stra. 810, Haslegrave v. Thompson, Mich. 4 G. 2.

{A declaration for "old iron" was holden good, on a motion in arrest of judgment.

Willes, 70, Talbott v. Spear, East. 11 G. 2.}

The declaration in an action of trespass charged the taking away of divers quantities of chinaware, earthenware, and linen. In order to arrest the judgment, it was said, that the declaration was bad; because it did not show the particulars of either sort of goods. It was on the other side said, that a great degree of certainty is not required in the declaration in an action of trespass, or in an action of trover; because no more damages can be recovered in these actions than are proved to have been sustained. The declaration was holden to be certain enough.

2 Barn. 222, Hobbs v. Green, East. 25 G. 2.

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||A declaration in trover for divers goods and chattels of the plaintiff is too general, and the judgment may be arrested; and a declaration for seizing 100 articles of furniture, and 100 articles of wearing apparel, without describing them, is bad on general demurrer.(a)

2 Ld. Raym. 1410, 1007; 1 Stra. 637; Fort. 377; 4 Burr. 2455; 7 Taunt. 642; 1 Moo. 389, S. C. (a) 8 Moo. 379.||

β In a declaration in trover for the conversion of promissory notes and bills of exchange, it is unnecessary to state their dates or times of payment, for the plaintiff is supposed not to have them in his possession.

Bank of New Brunswick v. Neillson, 3 Green, 337.γ

In the declaration in an action of trover, for the conversion of a beast or bird *feræ naturæ*, it must be shown that the beast or bird was reclaimed; because, unless it were reclaimed, the plaintiff could not have any property therein.

Dyer, 306, Fine's case. ||See tit. *Trespass, antè*, p. 505.||

If an action of trover be brought for the conversion of a bond, it is not necessary to recite any part of the bond in the declaration; for it may not be in the power of the plaintiff, who perhaps has not for some time been in possession of the bond, to recite any part thereof truly; and a misrecital would be fatal.

Cro. Ja. 262, Wilson v. Chambers.

If the person who has a special property in a bond bring an action of trover for the conversion of the bond, he must allege in his declaration that it is *scriptum suum obligatorium*, in the same manner as the obligee himself must have done if the action had been brought by him; for, as the action is not brought for the conversion of the money due upon the bond, but for the conversion of the bond, the words *scriptum suum obligatorium* are necessary, in order to show of what kind the writing is.

Ld. Raym. 276, Arnold v. Jefferson; Salk. 654.

It is laid down in one book, that if an action of trover be brought for the conversion of a living chattel, it must be alleged in the declaration that the chattel was of a certain price; and that if this action be brought for the conversion of a dead chattel, it must be alleged in the declaration that the chattel was of a certain value.

Cro. Ja. 130, Wood v. Smith.

But it is in another book laid down that, whether an action of trover be brought for the conversion of a living or a dead chattel, it is quite indifferent which set of words, *of the price*, or *of the value*, are made use of in the declaration.

Fitz. N. B. 88.

The value of the chattel, for the conversion of which an action of trover is brought, ought to be shown in the declaration.

2 Roll. Rep. 447, Goodwin v. Harwood. ||See Mayor of Reading v. Clarke, 4 Barn. & A. 268.||

But the justices of the Court of King's Bench were in one case divided in opinion, whether the want of showing in the declaration in an action of trover the value of the chattel be not such a matter of form as is after a verdict cured by the statutes of jeofails.

Cro. Ja. 130, Wood v. Smith.

||If the declaration allege the conversion to have been by husband and

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wife, it is well enough after verdict; for it will be intended such a conversion as they could both join in.

Keyworth v. Hill, 3 Barn. & A. 685.]]

It is the usual and the more proper way, for the plaintiff in an action of trover to allege in his declaration that the chattel came to the hands of the defendant by finding: but it is said to be sufficient, to allege generally, that it came to the hands of the defendant.

2 Bulstr. 313, Isaac v. Clark.

The venue in an action of trover may be laid in England for the conversion of a chattel in Ireland.

Salk. 290, Brown v. Hodges; 8 Mod. 322.

If the finding of the chattel, for the conversion of which an action of trover is brought, be in one county, and the conversion in another, the venue may be laid in either county; or, as this action is transitory, it may be laid in any other county.

It is not necessary to lay the venue in an action of trover at the place where the conversion was: but the declaration in such action is bad unless some place be alleged; because, unless a conversion at a place certain be found by the jury, the plaintiff is not entitled to judgment.

Cro. Eliz. 78, 98; 2 Bulstr. 313; Cro. Car. 525.

It is in one case laid down that, although the declaration in an action of trover allege the finding to have been at a place certain, if it do not expressly allege that the conversion was at a place certain, it is bad.

1 Roll. R. 132, Matthew v. Stranson, Mich. 26 Eliz.

But it is laid down in a subsequent case, that if the finding be alleged at a place certain, it is not necessary to allege that the conversion was at a place certain.

2 Bulst. 206, Atkins v. Wheeler, Pasch. 10 Jac. 1.

In the declaration in an action of trover it was alleged, that the chattel came to the defendant's hands by finding upon the fourth day of May in a certain year, and that afterwards, *scilicet* on the first day of May in the said year, he converted the chattel. Upon a motion in arrest of judgment it was said that this declaration is not good, because the conversion is alleged to have been before the finding; but it was holden to be good: and by the court—As the words, that afterwards he converted the chattel, are a sufficient allegation that the conversion was after the finding, that which is contained under the *scilicet* is repugnant to these words, and must be rejected as surplusage.

Cro. Jac. 428, Tesmond v. Johnson. ||See 2 Will. Saund. 290 (a), as to the effect of the *scilicet*.]

2. Of the Plea.

The defendant in an action of trover cannot justify; because the conversion must be confessed by a plea of justification; but the conversion is the tortious act, therefore cannot be justified.

Cro. Eliz. 146, 434; Salk. 654; Ld. Raym. 393.

The defendant in an action of trover cannot plead that the plaintiff was not possessed of the chattel charged to have been converted as of his own proper goods: nor is there any necessity for him to plead this; because the plaintiff cannot recover unless he prove a property in himself.

Bro. Act. sur le case, pl. 109.

(F) Pleadings in Trover. (*Plea.*)

In an action of trover, the defendant, a sheriff, pleaded, that he had levied and sold the goods under a *fiery facias*, which is the same conversion, *absque hoc* that he converted them *aliter vel alio modo*. This plea was holden to be bad: and by the court—The defendant ought to have pleaded not guilty, and might have given the matter pleaded in evidence.

Cro. Eliz. 434, *Ascue v. Saunderson*.

But it may be inferred from one case that the defendant in an action of trover may plead the payment of money, before the action was brought, in satisfaction of the conversion.

Allen v. Harris, Lutw. 1538.

The conversion of an ox being charged in the declaration in an action of trover, the defendant pleaded, that the plaintiff had before brought an action of trespass against J S and two others for the taking of an ox upon a day certain; that the defendants in that action pleaded in justification, that the taking was in right of the defendant in the present action; that upon a demurrer to this plea there was judgment for the defendants; that the plaintiff in the present action and in the former is the same person; that the ox charged to have been converted in the present action, and the ox charged to have been taken in the former action, is the same ox; that the conversion charged to have been committed by the defendant in the present action, if any have been, was committed by him together with the defendants in the former action; that the defendant in the present action was by covin not made a party to the former action; and that the defendants in the former action are by covin not made parties to the present action, which is brought for one and the same trespass, thing, and matter, as the former. The defendant concluded with praying judgment, whether, as there was judgment for the defendants in the former action, the plaintiff ought to maintain the present action. Upon a demurrer to this plea, Walmsley, J., and Kinsmill, J., were of opinion that it is good; and by them—As the property in the ox was by the judgment in the former action determined to be in the present defendant, in whose right the defendants in that action justified, the plaintiff could not have maintained the present action against them, and it is not reasonable that he should maintain it against the present defendant; because, although he were not a party to the record in the former action, he was a party to the trespass, and as such has right to avail himself, in pleading to the present action, of any thing contained in that record. Anderson, C. J., and Glanville, J., agreed, that the present defendant may avail himself, in pleading to the present action, of any thing contained in the record of the former action: but they were nevertheless of opinion, that the plea is not good; and by them—A judgment in an improper action can never be pleaded in bar to a proper action for the same cause. For instance, if J S, who has delivered goods to J N to keep, bring an action of trespass against J N for taking the goods, and there be judgment against J S, he may, notwithstanding this judgment, maintain an action of detinue against J N, for the goods; because the former action was misconceived. Walmsley, J., agreed, that if the defendant in an action of trespass for taking goods plead Not guilty, and there be judgment for him, this judgment cannot be pleaded in bar of an action of trover for the conversion of the goods; because, for any thing that appears upon the record to the contrary, the action may have been misconceived: but if a title to the goods be pleaded in the action of trespass, and there be judgment for the defend-

(F) Pleadings in Trover. (*Plea.*)

ant, this judgment may be pleaded in bar of an action of trover for the conversion of the goods; because the property in the goods is thereby determined to be in the defendant. The reporter adds, that the cause was afterwards referred to the arbitrators.

Cro. Eliz. 667, *Ferrers v. Arden*, Mich. 40 Eliz.

In another report of this case it is said to have been resolved, that a judgment in one personal action may in all cases be pleaded in bar to another personal action for the same cause.

6 Rep. 7, *Ferrers' case*. || See Lord Ellenborough's observations, 3 East, 357; *Vooght v. Winch*, 2 Barn. & A. 662; *Bagot v. Williams*, 3 Barn. & C. 235; S. C. 5 Dowl. & Ry. 87.||

The declaration in an action of trover charged the conversion of a hundred sheep on the thirtieth day of April, in the nineteenth year of the late king: the defendant pleaded not guilty as to eleven of the sheep; and as to the other eighty-nine, that the plaintiff had heretofore in an action of trespass declared against him for taking and driving away an hundred sheep, on the fourteenth day of April in the same year; that to this action he pleaded not guilty as to eleven of the sheep, and as to the other eighty-nine he pleaded a recovery of sixty pounds, in an action of debt brought by him against J S, that J S, being possessed of eighty-nine sheep, they were levied by virtue of a writ of *fiery facias* and sold to him; and that thereupon he took possession of the sheep; that issue being joined upon this plea, there was a verdict for the plaintiff with two-pence damages; and that the plaintiff entered up judgment for the damages and his costs. The defendant then averred, that the taking and driving away of eighty-nine sheep, for which the plaintiff recovered in the action of trespass, and the conversion of eighty-nine sheep charged in the present action, is the same trespass, thing, and matter; and that the judgment is still in force. To this plea the plaintiff replied, that true it is, that he did recover in the said action of trespass two-pence damages for the taking and driving away of the said eighty-nine sheep: but he averred, that the said two-pence damages were not assessed for the value of the said sheep; and that the defendant on the day mentioned in the declaration converted the said eighty-nine sheep. He then traversed that the taking and driving away charged in the action of trespass, whereupon judgment was given, is the same trespass, *quoad* the conversion, whereof he now complains. Upon a demurrer to this replication there was judgment for the plaintiff; but the court were not unanimous in opinion. Croke, J., Hutton, J., and Harvey, J., who were of opinion that the replication was good, said that the damages given in the action of trespass were so small, that the court must intend them to have been given only for taking and driving away the sheep; for that, if it should be intended they were given as a recompense for the sheep, the plaintiff would be deprived of his property in eighty-nine sheep, and have only two-pence for them. The court, rather than suffer so great a hardship, will intend, that the plaintiff had his sheep again; and that he lost them afterwards, and that the defendant found and converted them. It is moreover confessed in the present action by the demurrer, that the conversion was subsequent to the taking and driving away charged in the action of trespass; for the taking and driving away charged in that action, is alleged to have been upon the fourteenth day of April, in the nineteenth year of the late king; but the conversion, for which the present action is brought, is alleged to have been upon the thirtieth day of April in the same

(F) Pleadings in Trover. (*Plea.*)

year. Yelverton, J., who was of opinion that the replication was bad, said, that as it is averred in the declaration in the action of trespass, that the defendant did take and drive away the sheep, this implies that he ousted the plaintiff of his possession of the sheep and had them himself; and if this were so, the court ought now to intend, that the damages, although so very small, were given as a recompense for the sheep.

Cro. Car. 35, *Lacon v. Barnard*, Pasch. 2 Car. 1.

In an action of trespass for taking goods, issue was joined upon the plea of not guilty; and there was a verdict and judgment for the defendant. The plaintiff in that action afterwards brought the present action of trover against the same defendant for the conversion of the same goods. The defendant pleaded the judgment in the former action in bar of the latter, and the question upon a demurrer was, whether this plea be good? For the plaintiff, the case of *Lacon and Barnard* was relied upon; and in answer to what is said to have been resolved in *Ferrer's* case, that a judgment in one personal action may in all cases be pleaded in bar to another personal action for the same cause, it was said, this can only be true as to two personal actions, in which the same evidence will be sufficient to maintain both; but that the evidence, which is in many cases sufficient to prove a conversion of goods, and, consequently, to maintain an action of trover, is not sufficient to maintain an action of trespass; because, in the latter action, the possession of the goods must be proved to have been tortiously obtained. It was further said, that the court may in the present case very well intend that the plaintiff was mistaken in bringing an action of trespass; and if this were so, a judgment in an improper action can never be pleaded in bar of one that is proper. Pemberton, C. J., Jones, J., and Raymond, J., were of opinion that the plea is bad, and judgment was given for the plaintiff: but Dolben, J., very much doubted.

3 Mod. 2, *Putt v. Rawstern*, Mich. 34 Car. 2.

The conversion of ten pipes of wine being charged in the declaration in an action of trover, the defendant pleaded, that the plaintiff had heretofore in an action of trespass declared against him for taking and carrying away ten pipes of wine; that he had pleaded not guilty to the declaration in that action, and that upon a special verdict, which is set forth, there was a judgment for him. He then averred that the goods, for the conversion of which the present action is brought, are the same goods for the taking and carrying away of which the former action was brought. Upon a demurrer to this plea it was said, that an action of trover will lie in many cases where an action of trespass will not; and the case of *Putt and Rawstern* was relied upon. In answer to this it was said, that it appears in the present case, from the special verdict in the action of trespass, which is set forth in the plea, that the judgment was upon the merits; whereas in the case of *Putt and Rawstern*, as the verdict in the action of trespass was a general one, it could not appear that the verdict was not founded upon a mistake of the action. The justices were of opinion that the plea is good; but by reason of the judgment in the case of *Putt and Rawstern*, and of the importunity of the plaintiff's counsel, leave was given to argue the case again.

2 Ventr. 170, *Lechmere v. Toplady*, Pasch. 2 W. 3.

In another report of this case it is said, that all the justices were of opinion, upon the authority of what is said to have been resolved in *Fer-*

(F) Pleadings in Trover.

rer's case, that the plea is good. The reporter adds, that Pollexfen, C. J., said, he had never been satisfied with the judgment in *Putt and Rawstern*, which upon the bringing of a writ of error was, as he well remembered, agreed; for that he saw no difference betwixt that case wherein the judgment pleaded was given upon a general verdict, and the present case, wherein the judgment pleaded was given upon a special verdict.

1 Show. 146.

It has been holden, that if J S, after converting the goods of J N, sell them, J N may recover the money for which they were sold, in an action of *assumpsit* against J S; and that if J N afterwards bring an action of trover for the conversion of the goods, J S may plead the judgment in the action of *assumpsit* in bar of the action of trover.

Ld. Raym. 1317, *Lamine v. Dorrel*.

[The statute of limitations may be pleaded to an action of trover,

Cro. Car. 245; 1 Lutw. 99.]

{If goods are taken on an execution which is afterwards set aside *for irregularity*, the statute begins to operate from the first taking of the goods, and not from the time when the execution was set aside.

3 Johns. Rep. 523, *Read v. Markle*. Vide 2 East, 254, *Saunders v. Saunders*; 2 H. Black. 14, *Godin v. Ferris*.}

||The action must be commenced within six years after the conversion takes place; and if commenced after the six years, the statute of limitations is a bar to it, although the plaintiff did not know of the conversion within six years, unless the defendant practised any fraud to prevent the plaintiff knowing of it.

Granger v. George, 5 Barn. & C. 149; *White v. Edgeman*, 1 Tenn. 22. To support the plea of the statute of limitation in trover, by showing a conversion more than six years before action brought, the defendant must prove either an actual conversion in fact, or give evidence of a positive and absolute demand and refusal before that period. *Philpot v. Kelly*, 4 Nev. & M. 611; 3 Adol. & Ellis, 106; 1 Harr. & Woll. 134.

But where the action is brought by an administrator for a conversion *after* the death of the intestate, it may be brought within six years after the letters of administration granted; for till then the plaintiff has no title to sue: and, consequently, a plea in such case of Not guilty of the premises within six years is bad on special demurrer. The defendant should plead that the cause of action did not accrue to the plaintiff within six years.

Pratt v. Swaine, 8 Barn. & C. 285; and see 3 Barn. & A. 448; 5 Barn. & A. 204.]

[The bankruptcy of the defendant is no bar to an action of trover, though the conversion happened before the bankruptcy.

Parker v. Norton, 6 Term R. 695.] ||See *Eden's B. Law*, p. 122.]

β In trover a plea of property in a third person is bad.

Hurst v. Cook, 19 Wend. 469.

But the defendant may set up property in a third person, and show title in himself derived from such person.

Duncan v. Spear, 11 Wend. 54. See *Rotan v. Fletcher*, 15 Johns. 907; 11 Johns. 529; 3 Wend. 406.

In trover against A, it is no defence that the plaintiff had brought trover against B for the same chattel, recovered judgment, and imprisoned B in execution for sixty days.

Osterhout v. Roberts, 8 Cowen, 43.

(G) Of Evidence in an Action of Trover.

In trover the defendant pleaded that the plaintiff had recovered against him in an action of assumpsit for non-performance of "the very same identical promises and undertakings in the said declaration mentioned," &c. Held, that the plea was bad.

Smith v. Scantling, 4 Blackf. 443.

In trover, plea not guilty. Held, that the defendant could not deny the plaintiff's property, although the evidence was of a conversion by demand and refusal.

Barton v. Brown, 5 Mees. & W. 298.

In trover the defendant pleaded that J H was possessed of goods as of his own property, and that to prevent them from being taken in execution, he covinously pretended to sell them to the plaintiff. The replication that J H did for the purposes, &c., covinously pretend to sell said goods. Held, that the replication did not admit that the goods were the property of J H, and that the onus was on the defendant of proving a fraudulent sale by J H to the plaintiff.

Nicholls v. Bastard, 1 Tyr. & G. 156.

In trover, the plea of not guilty admits the plaintiff's property or right of possession, but only a property or right of possession to the extent required to maintain the action; therefore, it is open to the defendant to show that he and the plaintiff were tenants in common.

Stancliffe v. Hardwick, 2 C. M. & R. 1; 3 Dowl. P. C. 762; 5 Tyr. 551; 1 Gale, 127.

(G) Of Evidence in an Action of Trover.

||See *Phillipps on Evid.* vol. ii. 167, (6th ed.)||

It is incumbent upon the plaintiff in an action of trover to prove that he had a property in the chattel for the conversion of which the action is brought, and that he was possessed thereof at the time of the conversion.(a)

β Debow v. Titus, 5 Halst. 128; Mount v. Cubberly, 4 Harr. 124. § ||(a) Or at least that he had the immediate right of possession. Gordon v. Harper, 7 Term R. 9; Hall v. Pickard, 3 Camp. 187; Smith v. Plomer, 15 East, 607.||

β The plaintiff must have a right to the possession of the articles at the time of the conversion, in order to maintain trover.

Fairbank v. Phelps, 22 Pick. 535. See 9 Pick. 156,

But actual possession is not requisite.

Foster v. Goston, 6 Pick. 185; Hunt v. Holton, 13 Pick. 216. §

||In trover against several defendants all cannot be found guilty without evidence of a joint conversion by all. Therefore where the plaintiff brought trover against certain bankrupts and their assignees jointly, and it appeared in evidence that the bankrupts, before the bankruptcy, received the plaintiff's goods and tortiously pledged them; and that the assignees, after the bankruptcy, came into possession of them, and refused to deliver them up on demand; and the jury found all the defendants guilty: the court held that no joint conversion was proved, and granted a new trial.

Nicoll v. Glennie, 1 Maul. & S. 588. ||

It is necessary for the plaintiff in an action of trover to prove that the chattel came to the hands of the defendant. But it is not necessary for him to prove in what manner it did come to the defendant's hands; the conversion being the gist of an action of trover.

Moor, 841, Isaac v. Clerk.

(G) Of Evidence in an Action of Trover.

If the defendant in an action of trover came to the possession of the chattel by a tortious taking, it is not necessary for the plaintiff to prove a refusal to deliver it; for the tortious taking is in itself a conversion.

1 Sid. 264, Bruen v. Roe.

¶ And wherever a party comes to the possession of goods by a tortious delivery of a third person who has possession of them, (unless in case of sale in market overt,) the owner may recover the value in trover without a demand and refusal.

Featherstonhaugh v. Johnston, 2 B. Moo. 181.

Thus where a cargo of goods was shipped at Sunderland, intended for the plaintiff's agent in London; but by mistake they came to the hands of the defendant, who was ignorant of the plaintiff's property in them; it was held, that the plaintiff could recover in trover against the defendant, not only the value of the goods remaining in his hands when the plaintiff made a demand of them, but also the value of those which the defendant had sold before the demand.¶

But if the defendant came to the possession of the chattel by finding, or in any other lawful way, it is necessary for the plaintiff to prove a refusal to deliver it.

Moor, 460; Cro. Car. 262; 6 Mod. 212. ¶ Vide 2 H. Black. 135.¶

If the defendant in an action of trover, who came to the possession of the chattel by finding, or in any other lawful way, have intermeddled unlawfully therewith, it is not necessary for the plaintiff to prove a refusal to deliver it; for the unlawful intermeddling is, as has been already shown, a conversion.

It is in the general true, that evidence of a refusal to deliver the chattel for the conversion of which an action of trover is brought, is evidence of a conversion. But such evidence is not in every case evidence of a conversion.

1 Roll. Abr. 5, (P,) pl. 3; Hob. 187; 2 Show. 179; Salk. 655.

Although it be proved that the defendant in an action of trover refused to deliver the piece of timber which lies upon his land, yet if it be proved that the defendant never intermeddled with the piece of timber, evidence of a refusal to deliver it is not evidence of a conversion, inasmuch as the defendant is not in such case guilty of a malfeasance.

Bulstr. 310, Isaac v. Clerk; 2 Mod. 245.

If it appear that the chattel was lost by the defendant, or that he was robbed thereof before it was demanded, evidence of a refusal to deliver it is not evidence of a conversion; for it would be very hard to punish the defendant as a wrongdoer because he did not deliver a chattel which was not in his power at the time the demand was made: but it is in such case necessary for the defendant to prove that the chattel was lost, or that he was robbed thereof before the demand was made.

1 Roll. Abr. 6, pl. 4; Salk. 655; {5 Burr. 2825, Ross v. Johnson. See 1 Johns. Ca. 406, La Place v. Aupoix.} ¶ Vide 1 Taunt. 391; 2 Barn. & A. 702; 1 Camp. 439; 5 Barn. & A. 247; 2 Saund. 47 e, f, g, &c. (5th ed.); and *ante*, Trover, (B.)¶

If the defendant in an action of trover had a right to detain the chattel until a certain sum of money was paid, evidence of a refusal to deliver the chattel is not evidence of a conversion, unless the money were paid or tendered before a demand thereof was made.

(G) Of Evidence in an Action of Trover.

§ Under the general issue in trover, evidence of lien is inadmissible.

White v. Teale, 4 Perr. & D. 43.

{A demand of payment or satisfaction generally for the goods is sufficient.

1 Johns. Ca. 406, *La Place v. Aupoix*; 1 Esp. Rep. 31, *Thompson v. Shirley and Body*.

A demand in writing left at the defendant's house was ruled by Lord Kenyon to be sufficient.

1 Esp. Rep. 22, *Logan v. Houlditch*.}

In an action of trover by an administrator, he declared for the finding and conversion of the rum of his intestate. The evidence was, that the rum was taken by the defendant during the life of the intestate; but that it was not made use of by the defendant until the intestate was dead. This evidence was holden to be sufficient to maintain the action: and by the court—As the plaintiff was ignorant of the time of using the rum, the defendant ought, if he would avail himself thereof, to have disclosed this in his plea; but if he had done it, the evidence of his taking the rum during the life of the intestate and keeping it until his death would have been sufficient to maintain the action.

Stra. 60, *Crosier v. Ogilby*; ||2 *Saund.* 47, n., (5th edit.)||

[In an action of trover for rushes, the plaintiff proved that he was an inhabitant of T, and there was a custom for every one inhabitant *there* to cut and take rushes on the place in question; that he (by his servant) having cut down five or six loads of rushes, the defendants took and carried them away. The defendants called no witness. By the court—This is such evidence of property in the plaintiff, and conversion in the defendants, that they appear to be wrongdoers; for they have neither by evidence nor pleading shown any right or title to these rushes, and appear to us to be mere strangers.

Rackham v. Jesup, 3 Wils. 332.] ||Vide 2 *Taunt.* 302.||

Every thing, which tends to prove that the defendant has not been guilty of a conversion, may be given in evidence in an action of trover upon the general issue.

[Vide *Bull. N. P.* 48.]

A carrier who is defendant in an action of trover, may give in evidence upon the general issue, that he refused to deliver the goods because the money due for the carriage of them had not at the time of a demand been paid or tendered; for unless this money were paid or tendered before the demand was made, he has not been guilty of a conversion. And without mentioning any other instance of the like kind it may in the general be observed, that wherever the defendant in an action of trover had a right at the time of a demand to detain the chattel, he may give this right in evidence upon the general issue; because the defendant has not in any such case been guilty of a conversion.

Salk. 654, *Hertford v. Jones*. ||*Ante*, *Trover*, (B).||

If one joint-owner of a chattel bring an action of trover against another joint-owner, the defendant may give in evidence upon the general issue, that he is joint-owner with the plaintiff; because this, which shows a right in him to the possession of the chattel, does at the same time show that he has not been guilty of a conversion, ||unless in case of destruction, or what

(G) Of Evidence in an Action of Trover.

is tantamount to it;|| but if one joint-owner of a chattel bring an action of trover against a stranger, the defendant cannot give in evidence upon the general issue, that J S is joint-owner with the plaintiff.(a)

Salk. 290, Brown v. Hodges; [Cowp. 450, S. C. cited.] ||(a) It must be pleaded in abatement. 1 Saund. 291, (K), and cases there collected; but see Nathan v. Buckland, 2 Moo. 153.||

If the money for which J S after converting the chattel of J N sold it, have been recovered by J N in an action of *assumpsit*, and J N afterwards bring an action of trover for the conversion of the same chattel, the judgment in the action of *assumpsit* may be given in evidence in the action of trover upon the general issue; because, as it appears from this judgment, that the plaintiff has recovered the value of the chattel, it does likewise appear, that he has no property therein; and, consequently, that the defendant has not been guilty of a conversion.

Ld. Raym. 1217, Lamine v. Dorrel.

[In some cases it is allowed in this action to bring the thing into court for which the action is brought. But herein this distinction is to be observed: if trover is brought for a specific chattel of an ascertained quantity and quality, and unattended with any circumstances that may enhance the damages beyond the real value, but that its real and ascertained value must be the sole measure of the damages, then the specific thing demanded may be brought into court. But where there is an uncertainty, either as to the quantity or quality of the thing demanded, or there is any tort accompanying it that may enhance the damage above the real value of the thing, and there is no rule whereby to estimate the additional value, there it shall not be brought into court.

3 Burr. 1364.

In trover for a bond, though the case seemed a very favourable one for the defendant, the court said they could stay the proceedings upon the delivery up of the bond, as the plaintiff insisted upon going for special damages.

Whittend v. Fuller, 2 Bl. R. 902.

Where goods are cumbrous, the court will grant a rule to show cause why, on the delivery of the goods to the plaintiff, and paying costs, proceedings should not be stayed.

Cook v. Holgate, C. B., Tr. 10 G. 2; Watts v. Phipps, B. R., East. 7 G. 3, Bull. N. P. 49.]

||In trover for a packet of letters, the defendant was allowed to stay proceedings as to *one* of them, on delivering it up, and paying costs.

Earle v. Holderness, 4 Bing. 462; and see 7 Term R. 53; Tidd's Prac. 571; 6 Bing. 408.

But where the value of the goods is unascertainable, the court will not stay proceedings on delivery of the goods to the plaintiff, or payment of the value of them.

Tucker v. Wright, 3 Bing. 601; and see Makinson v. Rawlinson, 9 Price R. 460.]

¶ Where the plaintiff in his declaration described the note which was the subject of an action of trover as being for \$180, and the note proved to be in possession of the defendant was for \$300, the variance was holden to be fatal.

Bissel v. Drake, 19 Johns. 66.¶

§ (H) Of the Verdict, Damages, and Judgment in an Action of Trover.

A JURY cannot give penal damages in trover, though there be a condition annexed to the verdict that the damages shall be released on the delivery of the specific property.

M'Dowell v. Murdock, 1 Nott & M'C. 237. See *Norris v. Beckley*, 2 Rep. Const. Ct. 228.

In trover, the value of the property at the time of the demand, with interest, or other compensation, is the measure of damages ; consequential damages are not recoverable.

Buford v. Fannen, 1 Bay, 273.

If the damages recovered by judgment, in an action of trover for the conversion of personal property, be paid by the defendant, the property having been retained by the defendant, his title to it has relation back to the conversion, and the property thus becomes his own.

Hepburn v. Sewell, 5 Har. & J. 211 ; *Osterhout v. Roberts*, 8 Cowen, 43 ; 7 Cowen, 95 ; 8 Wend. 505.

The measure of damages is the value of the property at the time of the conversion, with interest from that time.

Dillenback v. Jerome, 7 Cowen, 294.

In trover the plaintiff is entitled to recover for the injury done to his goods as well as for their value.

Jamison v. Hendricks, 2 Blackf. 96.

A creditor of the husband having taken trust property of the wife by execution and sold it at the post, the husband bid it off for the trustees, paying less for it than its value ; trover was brought by the trustees against the creditor, and held that proof of this fact was admissible in mitigation of damages ; the real damages sustained, which was the sum paid at the post for the restoration of the property, being the rule of damages in the case.

Baldwin v. Porter, 12 Conn. 473.

In trover for goods, the defendant pleaded payment of money into court, and the plaintiff replied that he had sustained more damages : the defendant paid into court the cost price of the goods, having offered the goods in specie to the plaintiff two days after they ought to have been delivered. The plaintiff proved that he had sustained inconvenience and loss by not having the goods delivered in proper time. The jury found for the defendant, and the court refused to set aside the verdict.

Evans v. Lewis, 3 Dowl. P. C. 819.

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